United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7173

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P/S

United States Court of Appeals

For the Second Circuit.

MICHAEL McSWEENEY,
Plaintiff-Appellant,

against

M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., YAMASHITA SHINNIHON LINE and INTERNATIONAL TERMINAL OPERATING CO., INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

UNITED STATES COURT OF APPEALS
FILED
JUL 6 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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DOCKET ENTRIES.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

MICHAEL MCSWEENEY,

Plaintiff-Appellant,

against

M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., YAMASHITA SHINNIHON LINE and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Defendants-Appellees.

- -X

DOCKET ENTRIES.

DOCKET ENTRIES.

DATE	PROCEEDINGS
MAY1-72	FILED COMPLAINT. ISSUED SUMMONS.
JUN 5-72	Filed summons with marshal's return. ServedM.J. Rudolph Corp. by J.J.Gleason on 5/5/72. Also served Kawasaki-Kisen-Kaisha,Ltd. by Joan Comando on 5/15/72. " " International Terminal Operating Co. Inc. by A.R.Corrachio on 5/16/72.
n 6.72	Filed STip & Order extending time for dft. M.J.Rudolph Co., Inc, M.J. Rudolph Corp to answer to 6/19/72. So Ordered Cannella J.
Jul 3-72	Filed ANSWER of defts. M.J.Rudolph Co.Inc., and M.J.Rudolph Corp. to complaint, with cross-complaint
Jul 3-72	Filed Notice of Deposition.
Jul 11-72	Filed Notice to take Deposition of plaintiff and co-defendants.
Jul 11-72	Filed ANSWER of International Terminal Operating Co.Inc. to complaint withcross-claim - and jury demand.
Jul 13-72	Filed Answer of defts.M.J.Rudolph Co.Inc. and M.J.Rudolph Corp. to cross-claims.
Jul 27-72	Filed deft Rudolph's Interrogatories.
Jul 27-72	Filed [illegible] for M.J. Rudolph co. Inc. & M.J. RUDOLPH corp. (defts) ANSWER to cross-complaint.
Jul 27-72	Filed Interrogatoriesof co-deft Kawasaki.
Jul 27-72	Filed Pltffs Interrogatories
Aug 21-72	Filed defts notice of taking deposition of the Pltff.
Aug 21-72	Filed defts K.K.K. ANSWER of Kawasaki-Kisen Kaisha, Ltd to Complaint & to Cross-Claims.
Aug 21-72	Filed Defts K.K.K Interrogatories addressed to Pltff.
Nov 2-72	Filed deft International Terminal Operating Co, Interrogatories
Nov 2-72	Filed deft International Terminal Operating Co, notice to take deposition of cO-deft Yamashita Shinnihon Line on 11/20/772.
Nov 2-72	Filed Pltffs notice to take deposition of the defts.
Nov 3-72	Filed defts notice to take deposition of CO-Deft M.J. Rudolph Corp. on 11/17/72.
Nov 3-72	Filed deft Yamashita Shinnihon Line notice to take deposition of William McSweeney on 11/17/72.
Nov 3-72	Filed deft Yamashita Shinnihon notice to take deposition of Co-Deft International Terminal Operating Co, Inc. on 11/17/72.
Nov 3-72	Filed deft Yamshitas Shinnihon Line Interrogatories addressed to the pltff.
Nov 3-72	Filed stip & order that the name of the deft "Kawaasaki-Kisen-Kaisha, Ltd, is deleted from the action and the name "Yamashita Shinnion Line is substituted in place thereof. Also stipulated that the substituted deft shall have 30 days after the entry of the order on this stip to serve a new answer to the complaint. So Ordered Ryan J.
Nov 27-72	Filed deft Yamamshita Shinnihon Line, ANSWER to crossclaim
Nov 27-72	Filed deft Yamashita Shinnihon Line ANSWERZto the complaint as amended with cross claim
Dec 11-72	Filed deft International Terminal Operating, Co. demand for a trial by jury.
Dec 11-72	Filed stip & order that the time for the deft Yamashita Shinnihon to answer I.T.O. Interrogatories is extended to 1/2/73. So Ordered Ryan J.

DOCKET ENTRIES

Jan 8-73	Filed deft Rudolph ANSWER to cross-claim of deft Yamashita Shinnihon Line.
Jan 10-73	Filed Pltffs reply to Interrogatories.
Jan 12-73	Filed deft Yamashita notice of motion, Re: Dismiss Complaint, Ret before Ryan J. on 1/23/73.
Jan 12-73	Biled deft Yamashita memo of law in support of its motion.
Jan 22-73	Filed Pltffs answers to Interrogatories propounded by the deft Yamashita Shinnihon Line.
Jan 23-73	Filed stip & order that the motion to dismiss the complaint by deft Yamashita Shinnihon Line is hereby returnable January 25. 1973. So Ordered Ryan J.
Jan 30-73	Filed stip & order that the time for deft. Yamashita to answer ITO'S Interrogatories is extended to1/30/73. So Ordered Ryan J.
Mar 5-73	Filed stip & order that the name of the pltff. in the title of this action is hereby amended as indicated, So Ordered Ryan J.
ar 5-73	Filed stip & order that the time for the deft. Yamashita to answer I.T.O'S Interrogatories is extended to 2/26/73
ar 8-73	Filed stip & order that the time for the deft. Yamashita to answer I.T.O.'s Interrogatories is extended to 3/26/73. So Ordered Ryan J.
Mar 30,73	Filed Stip & Orders that the time for dft. Yamashita to respond to I.T.O's interrogs. is extended to 4/26/73. So Ordered Ryan J.
pr 17,73	Filed Order, that all discovery be completed by 120 Days, etc. Ryan J. (M/E)
Oct23-73	Filed interrogs propounded to the deft. Yamashita Shinnihon
Nov.1.73	Filed Order that discoveryproceedings pertaining to deft. Yamashita Shinnihon Line & the commencement of Pre Trial proceedings by pltff. is extended to 11/27/73 . Ryan J.
ov. 8-73	Filed deft's (Yamashita) answers to interrogs.
. 16/73	PRE-TRIAL CONFERENCE HELD BY Ryan
Dec 9,74	Filed Pre Trial Memorandum of deft. International Terminal Operating Co. Inc.
12-9-74	PRE-TRIAL CONFERENCE HELD BY RABY
-27-74	PRE-TRIAL CONFERENCE HELD BY RABY
-3-75	PRE-TRIAL CONFERENCE HELD BY RABY
Feb 6,75	Filed Consented Pre Trial Order. Ryan J.
Feb 6,75	Filed Pltffs. Memorandum of Law.
-24-75	P.T.C. Held Owen J.
-16-76	PRE-TRIAL CONFERENCE HELD BY Owen,J.
03-12-76	Filed Pltff's. notice of taking deposition of Dr. Jerome I. Cook on 3-17-76.
03-18-76	Before Owen,J. jury trial begun.
03-19-76	Trial continued.
03-22-76	Trial continued.
03-23-76	Trial continued & concluded. Jury verdict for Defts. Rudolph. All other Defts'. motion to dismiss granted.
03-26-76	Filed Judgment - That Defts. M.J. Rudolph Co., Inc. and M.J. Rudolph Corp., have judgment against Pltff. dismissing the complaint, and that the complaint is hereby dismissed as to the remaining Defts........Clerk. (mailed notice)
04-02-76	Filed Pltff's. notice of appeal from the judgment of 3-26-76 dismissing the complaint. (mailed notice)
05-28-76	Filed Transcript of record of proceedings dated March 18, 19, 22 & 23-1976

COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------X
WILLIAM McSWEENEY,
:
Plaintiff,
-against-
:
M. J. RUDOLPH CO., INC.,
M. J. RUDOLPH CORP.,
KAWASAKI-KISEN-KAISHA, LTD.,
and INTERNATIONAL TERMINAL
OPERATING CO., INC.,
:
Defendants
-----------------------------------X

SEAMAN'S COMPLAINT

PLAINTIFF DEMANDS
TRIAL BY JURY

CIVIL ACTION
FILE NO.

ACTION UNDER SPECIAL RULE FOR SEAMEN TO SUE WITHOUT SECURITY AND PREPAYMENT OF FEES

Plaintiff, by his Attorneys, CORCORAN AND BRADY, ESQS., complaining of the Defendants, respectfully alleges:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS M. J. RUDOLPH CO., INC. AND M. J. RUDOLPH CORP.

1. Upon information and belief that at all the times hereinafter mentioned, the Defendants M. J. RUDOLPH CO., INC. and M. J. RUDOLPH CORP. were and are New York Corporations duly organized and existing under and by virtue of the laws of the State of New York with an office at 8 Sacket Street, Brooklyn, New York for the transaction of its maritime and related business.

2. Upon information and belief that at all the times hereinafter mentioned, the Defendant KAWASAKI-KISEN-KAISHA, LTD. was and is a foreign Japanese Corporation, existing locally under and by virtue of the laws of New York with offices at 29 Broadway, New York, New York for the transaction of its maritime and related business.

3. Upon information and belief that at all the times hereinafter mentioned, the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. was and is a New York Corporation duly organized and existing under and by virtue of the laws of New York with offices at 17 Battery Place, New York, N.Y. for the transaction of its stevedoring and related business.

4. Upon information and belief at all the times herein mentioned the Defendant M. J. RUDOLPH CORP. (hereinafter referred to as "RUDOLPH") owned or leased and operated a certain vessel variously described as a "Floating-Diesel-Crane-Rig" known as and hereinafter refered to as "#5-Rig".

5. Upon information and belief at all the times hereinafter mentioned the Defendant KAWASAKI-KISEN-KAISHA, LTD. (hereinafter referred to as "KAWASAKI", owned the

ocean going vessel known as S.S. YAMASHITO-MARU and operating under foreign flag registration.

6. Upon information and belief, at all the times hereinafter mentioned the Defendant "KAWASAKI operated the S.S. YAMASHITO-MARU.

7. Upon information and belief at all the times hereinafter mentioned the above named Plaintiff was and is a United States Citizen and a resident of New Jersey, in the employ of the Defendants M.J.RUDOLPH CO.,INC. and/"RUDOLPH", serving on duty on board the "#5-RIG" as an Oiler and Fireman and crewman of said "#5-RIG".

8. Upon information and belief, at all the times hereinafter mentioned, the S.S. YAMASHITO-MARU was berthed on the southerly side of Pier 6, portside to the stringpiece with her bow facing southwest to the bulkhead and distant approximately 150' (in the navigable waters of East River just off Atlantic Avenue, Brooklyn, New York, distant from the "#5-RIG" berthed adjacent to the Pier-Bulkhead with the #5-RIG's starboard side in position generally perpendicular to the bow of the S.S. YAMASHITO-MARU in midst cargo-loading operations.

COMPLAINT

9. Upon information and belief at all the times hereinafter mentioned and pursuant to agreement between the parties, the S.S. YAMASHITO-MARU's agents and representatives engaged the INTERNATIONAL TERMINAL OPERATING CO., INC. (hereinafter referred to as "I.T.O.") as Stevedore to perform cargo-loading work aboard the S.S. YAMASHITO-MARU; and in connection with Container-Cargo to go aboard the S.S. YAMASHITO-MARU, her agents and representatives engaged the Defendants "RUDOLPHS" to assist the Defendant "I.T.O." in this operation.

10. Upon information and belief at all times hereinafter mentioned the S.S. YAMASHITO-MARU's cargo-loading work operation and procedure to remove the heavy containers from the bulkhead dock alongside #5-RIG was as follows: The moored #5-RIG's diesel Crane (with its 92 foot boom, and crane-engineer riding in its elevated cab) would bring the containers on to its own deck. When enough containers were set down on the #5-RIG's deck, the "FLOAT" would then be taken in-tow by a tug and brought alongside the starboard side of the S.S. YAMASHITO-MARU, whereupon with appropriate aid of "I.T.O." and ship personnel, the Crane-lift would load

the Container-Cargo aboard the S.S. YAMASHITO-MARU in accord with the Ship's Cargo-Stowage plan and direction.

11. Upon information and belief, at all the times hereinafter mentioned, it was the duty of Defendants "RUDOLPH" to provide Plaintiff with a safe and seaworthy vessel and appliances, gear and equipment and to keep the same in a safe and usable condition appropriate for work undertaken, and to furnish and provide Plaintiff with a safe place in which to work; to furnish him with reasonably safe and seaworthy tools, appliances and gear and keep the same in a working safe condition; to furnish Plaintiff with a sufficient number of competent co-employees and superior personnel; to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn plainti of the dangers arising and to be encountered therein.

12. That by reason of the negligent failure of the Defendants "RUDOLPH" their agents, servants and employees and each of them to perform the foregoing duties and each of them, Plaintiff was severely, seriously and permanently injured on November 14, 1970 while he was engaged in the performance of his duties aboard the "#5-RIG" as hereinafter described, all without any fault on his part contributing thereto.

COMPLAINT

13. That heretofore and on the 14th day of November 1970 at about 8:15 A.M. of said day while Plaintiff had turned to and was prudently engaged in the performance of his duties aboard the "#5-RIG" adjacent to said Pier 6 bulkhead in furtherance of the Container Cargo Operation of S.S. YAMASHITO-MARU and assisting "I.T.O." work and while wrongfully allowed and permitted unaided, unassisted and unsupervised on the bulkhead, he was guiding in hand the suspended Crane-boom 4-part-block replacing its insufficient and inadequate #2-part-block, when suddenly without sign, signal, warning, aid or assistance, the heavy block veered and lurched and turned from its intended movement wrenching Plaintiff and twisting his torso simultaneously casting him with force to the bulkhead and causing the injuries complained of herein - all without any fault on Plaintiff's part contributing thereto.

14. By reason of the foregoing, Plaintiff suffered the following injuries:

The Plaintiff suffered a severe lumbo-sacral limitation of motion and paravertebral spasm, tenderness in the PSIS region with lumbo-sacral sprain; Plaintiff also

suffered meralgia paresthetics on left side, severe pain in the neck and back with limitation of motion with discomfort in the extremities particularly the outer side of the thighs; Plaintiff admitted to hospital and placed in traction for recurrent episodes of pain and stiffness in neck and back; Plaintiff suffered from narrowing at L-5, S-1 and flattening of the lumbar curvature with extensive dorsal neck pain and limitation.

15.,Upon information and belief, the said injuries were directly caused by reason of the negligence of Defendants "RUDOLPH", their agents, servants and employees in that they failed and neglected to supply the Plaintiff with a safe place to work; failed to supply the Plaintiff with a sufficient number of competent co-employees and supervisory personnel and that those supplied were negligent; failed and neglected to provide plaintiff with sufficient aids, gear, mechanical, personnel or otherwise; failed to properly instruct the Plaintiff in the course of his duties; failed to properly and prudently supervise and superintend the work going on at the time Plaintiff was injured; failed to promulgate and enforce proper and safe rules for the safe conduct of the work and defendants failed to warn plaintiff of impending dangers to be encountered and neglected and failed to aid plaintiff avoiding said dangers.

16. Upon information and belief, that by virtue of Section 33 of the Merchant Seamen's Act of January 5, 1920 and Amendments thereto, and Section 46 U.S.C, Section 688 (Jones Act) applicable to Seamen employed upon vessels in navigable waters, the Plaintiff is entitled to recover damages for the negligence of this Defendant and of his co-employees in the Defendant's service.

17. That by reason of the foregoing, Plaintiff was damaged in the sum of **TWO HUNDRED THOUSAND and 00/100 ($200,000.00) DOLLARS.**

18. Upon information and belief, this Honorable Court has jurisdiction herein, the action being Maritime in nature, and brought pursuant to and within above stated United States Statutes, Codes and Rules, as well as jurisdiction over the parties-defendants as said defendants severally are within the Southern District of New York.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS "RUDOLPH" AND "KAWASAKI" BASED UPON GENERAL MARITIME LAW.

19. Plaintiff repeats and reallegs each and every allegation herein numbered "1" through "10" inclusive, with the same force and effect as though set forth at length herein.

20. Upon information and belief at all the times hereinafter mentioned, it was the duty of Defendants "RUDOLPH" and "KAWASAKI" to provide Plaintiff with a safe and seaworthy vessel as to their respective #5-RIG and S.S. YAMASHITO-MARU including safe and seaworthy appliances, gear and equipment appropriate for the Container-Cargo-Loading-Operation underway; and to provide Plaintiff with a safe place to work and to furnish Plaintiff with competent supervisory personnel.

21. That by reason of Defendant's ("RUDOLPH" and "KAWASAKI") failure to perform the foregoing duties and each of them, Plaintiff was severely, seriously and permanently injured on November 14, 1970 while prudently engaged in the performance of his duties aboard the #5-RIG as hereinafter described, all without any fault on his part contributing thereto.

COMPLAINT

22. Plaintiff repeats and realleges Paragraph 13 herein with the same force and effect as though set forth at length.

23. Plaintiff repeats and realleges Paragraph 14 herein with the same force and effect as though set forth at length.

24. Upon information and belief, Plaintiff's said injuries and damages were directly caused by reason of the unseaworthiness of defendants' respective vessels in connection with the cargo-loading-operation of the S.S. YAMASHITO-MARU and defendants' callous failure to furnish and provide Plaintiff with a safe place to work nor furnish him with competent supervisory personnel to superintend the Container-Cargo-work then being performed, Plaintiff in no wise contributing thereto.

25. That by reason of the foregoing, Plaintiff was damaged in the sum of $200,000.00.

26. Upon information and belief, this Honorable Court has jurisdiction herein, the action being Maritime in nature and having Supreme Court cognizance under General Maritime Law.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT INTERNATIONAL TERMINAL OPERATING CO., INC.

27. Plaintiff repeats and realleges each and every allegation herein numbered "1" through "10" inclusive with the same force and effect as though set forth at length herein.

28. Upon information and belief, at all the times hereinafter mentioned it was the duty of Defendant "I.T.O." (having undertaken the stevedoring work in connection with the Container-Cargo-Loading Oporation of the S.S. YAMASHITO-MARU) to provide overall supervisory personnel in handling of said cargo as well as related adequate, proper and sufficient aid, gear and appliances and a safe place for Plaintiff to work and to warn plaintiff of dangers reasonably foreseeable and to be encountered therein, and to take appropriate means and measures to avoid said dangers.

29. That by reason of the negligent failure of Defendant "I.T.O.", its agents, servants and employees to perform the foregoing duties and each of them, Plaintiff was severely, seriously and permanently injured on

November 14, 1970 while he was engaged in the performance of his duties aboard the #5-RIG as more particularly described below. All without any fault on Plaintiff's part contributing thereto.

30. Plaintiff repeats and realleges each and every allegation of the complaint herein numbered "13" and "#14" with the same force and effect as though set forth at length herein.

31. Upon information and belief the said injuries were directly caused by reason of the negligence of Defendant "I.T.O.", its agents, servants and employees, and said Defendants' callous disregard for Plaintiff's safety in the performance of his work; and Defendants' failure and neglect to provide and furnish Plaintiff with sufficient and proper aid and gear in performance of work at hand; and further, Defendants' failed and neglected to provide competent, supervisory personnel to oversee the work and its safe performance.

32. That by reason of the foregoing, Plaintiff was damaged in the sum of $200,000.00.

33. Plaintiff repeats and realleges each and every allegation of the complaint numbered "26" herein with the same force and effect as though set forth at length.

WHEREFORE: Plaintiff demands Judgment against the Defendants M. J. RUDOLPH CORP. and M. J. RUDOLPH CO. INC. in the First Cause of Action in the sum of $200,000.00; and against the Defendants M.J. RUDOLPH CORP. and M. J. RUDOLPH CO., INC. and KAWASAKI-KISEN-KAISHA, LTD. in the Second Cause of Action in the sum of $200,000.00; and against the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. in the Third Cause of Action in the sum of $200,000.00, besides costs and excluding maintenance.

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, N. Y. 10007
Tel. 227-2242

BY William J Corcoran
WILLIAM J. CORCORAN

ANSWER AND CROSS COMPLAINT OF DEFENDANTS, M. J. RUDOLPH CO., INC., AND M. J. RUDOLPH CORP.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--------------------------------------x
WILLIAM McSWEENEY, :

Plaintiff, : 72 Civil 1782

-against-

ANSWER WITH CROSS-COMPLAINT

M.J. RUDOLPH CO., INC., :
M.J. RUDOLPH CORP.,
KAWASAKI-KISEN-KAISHA, LTD., :
and INTERNATIONAL TERMINAL
OPERATING CO., INC., :

Defendants. :
--------------------------------------x

DEFENDANTS DEMAND
TRIAL BY JURY

Defendants, M.J. RUDOLPH CO., INC., and M.J.RUDOLPH CORP., by its attorneys, D'AMATO, COSTELLO & SHEA, answer the complaint of the plaintiff, allege upon information and belief:

ANSWERING A FIRST CAUSE OF ACTION:

FIRST: Deny each and every allegation contained in paragraph of the complaint designated "1", except admit the defendants M.J. RUDOLPH CO., INC. and M.J. RUDOLPH CORP. were and are Corporations with an office at 8 Sacket Street, Brooklyn, New York for the transaction of its maritime and related business.

SECOND: Allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "2", THIRD: Allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "3".

FOURTH: Admit the allegations contained in paragraph of the complaint designated "4".

FIFTH: Allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "5".

SIXTH: Allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "6".

SEVENTH: Admit the allegations contained in paragraph of the complaint designated "7" except deny plaintiff was in the employ of M.J. RUDOLPH CO.,INC.

EIGHTH: Allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "8".

NINTH: Deny each and every allegation contained in paragraph of the complaint designated "9" insofar as it relates to this answering defendant, except admit that the vessel owner or its agents employed M.J. RUDOLPH CORP.

TENTH: Allege that it is without knowledge or informatio sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "10".

ELEVENTH: Deny each and every allegation contained in paragraph of the complaint designated "11" and respectfully refer all questions of law to this honorable court.

TWELFTH: Deny each and every allegation contained in paragraph of the complaint designated "12".

THIRTEENTH: Deny each and every allegation contained in paragraph of the complaint designated "13".

FOURTEENTH: Deny each and every allegation contained in paragraph of the complaint designated "14".

FIFTEENTH: Deny each and every allegation contained in paragraph of the complaint designated "15".

SIXTEENTH: Deny each and every allegation contained in paragraph of the complaint designated "16".

SEVENTEENTH: Deny each and every allegation contained in paragraph of the complaint designated "17".

EIGHTEENTH: Allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "18".

ANSWERING A SECOND CAUSE OF ACTION:

NINTEENTH: Repeat, reiterate and reallege each and every denial heretofore alleged with the same force and effect as if set forth hereat, fully and at length.

TWENTIETH: Deny each and every allegation contained in paragraph of the complaint designated "20" insofar as they refer to this answering defendant and respectfully refer all questions of law to the honorable court.

TWENTY-FIRST: Deny each and every allegation contained in paragraph of the complaint designated "21" insofar as they refer to this answering defendant.

TWENTY-SECOND: Repeat, reiterate and reallege each and every denial heretofore alleged with the same force and effect as if set forth hereat, fully and at length.

TWENTY-THIRD: Repeat, reiterate and reallege each and every denial heretofore alleged with the same force and effect as if set forth hereat, fully and at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph of the complaint designated "24" insofar as they refer to this answering defendant.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph of the complaint designated "25".

TWENTY-SIXTH: Allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "26".

ANSWERING A THIRD CAUSE OF ACTION:

TWENTY-SEVENTH: Repeat, reiterate and realleges each and every denial heretofore alleged with the same force and effect as if set forth hereat, fully and at length.

TWENTY-EIGHTH: Admit the allegations contained in paragraph of the complaint designated "28".

TWENTY-NINTH: Deny each and every allegation contained in paragraph of the complaint designated "29".

THIRTIETH: Repeat, reiterate and realleges each and every denial heretofore alleged with the same force and effect as if set forth hereat, fully and at length.

THIRTY-FIRST: Deny each and every allegation contained in paragraph of the complaint designated "31".

THIRTY-SECOND: Deny each and every allegation contained in paragraph of the complaint designated "32".

THIRTY-THIRD: Repeat, reiterate and realleges each and every denial heretofore alleged with the same force and effect as if set forth hereat, fully and at length.

ANSWER AND CROSS COMPLAINT OF DEFENDANTS, M. J. RUDOLPH CO., INC., AND M. J. RUDOLPH CORP.

AS AND FOR A CROSS-COMPLAINT AGAINST THE CO-DEFENDANTS, KAWASAKI-KISEN-KAISHA, LTD. and INTERNATIONAL TERMINAL OPERATING CO., INC., IN THE EVENT JUDGMENT IS RENDERED AGAINST THEM, DEFENDANTS M.J. RUDOLPH CO., INC., and M.J. RUDOLPH CORP., ALLEGE UPON INFORMATION AND BELIEF:

THIRTY-FOURTH: Any liability of these answering defendants, which is denied, will have been brought about by the active, primary and affirmative negligence of the co-defendants, KAWASAKI-KISEN-KAISHA, LTD. and INTERNATIONAL TERMINAL OPERATING CO., INC., all by breaches of the warranties of seaworthiness and workmanlike service which they owed to these answering defendants, and therefore, these answering defendants, M.J. RUDOLPH CO., INC., and M.J. RUDOLPH CORP., will be entitled to complete indemnity therefore.

WHEREFORE, defendants M.J. RUDOLPH CO., INC., and M.J. RUDOLPH CORP., demand judgment dismissing the complaint, together with the costs and disbursements of the action, but in the event judgment is rendered against them or either of them, that they have judgment over and against the co-defendants, KAWASAKI-KISEN-KAISHA, LTD., and INTERNATIONAL TERMINAL OPERATING CO., INC., in like amount, together with the costs and disbursements of the action and the expenses incurred in the defense thereof.

Dated: New York, New York
June 19, 1972

Yours, etc.,

D'AMATO, COSTELLO & SHEA
Attorneys for Defendants M.J.
RUDOLPH CO., INC., and M.J.
RUDOLPH CORP.

By:
A Member of the Firm
Office & P.O.Address
116 John Street
New York, New York 10038
227-5189

TO: CORCORAN AND BRADY,ESQS.
Attorneys for plaintiff
Office & P.O.Address
11 Park Place
New York, New York 10007
227-2242

ANSWER AND CROSS COMPLAINT OF DEFENDANT YAMASHITA SHINNIHON LINE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

WILLIAM McSWEENEY,

Plaintiff,

-against-

M. J. RUDOLPH CO., INC.
M. J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE
& INTERNATIONAL TERMINAL
OPERATING CO., INC.

Defendants.

---x

ANSWER OF YAMASHITA SHINNIHON LINE TO COMPLAINT AS AMENDED WITH CROSS-CLAIM

72 Civil 1782

Defendant Yamashita Shinnihon Line, by its attorneys, Kirlin, Campbell & Keating, answering the complaint of the plaintiff as amended by stipulation and order of Sylvester J. Ryan, dated November 3, 1972 respectfully shows and alleges upon information and belief as follows:

FIRST: It admits defendant Yamashita Shinnihon Line was and is a Japanese Corporation. It denies each and every other allegation contained in paragraph numbered SECOND of the complaint.

SECOND: It admits defendant Yamashita Shinnihon Line operated the YAMAWAKA MARU except for those parts of said vessel which were operated by independent contractors including International Terminal Operating Co., Inc., M. J. Rudolph Corp. & M. J. Rudolph Co., Inc. It denies each and every other allegation contained in paragraph numbered SIXTH of the complaint.

THIRD: It admits that the YAMAWAKA MARU was at pier 6 on November 14, 1970. It denies each and every other allegation contained in paragraph numbered EIGHTH of the complaint.

FOURTH: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to each and every allegation contained in paragraphs numbered 7, 16, 18 and 26 of the complaint.

FIFTH: It denies each and every allegation contained in paragraphs numbered 9, 10, 13, 14, 17, 19, 20, 21, 22, 23, 24 and 25 of the complaint.

AS A FIRST DEFENSE

SIXTH: The complaint fails to state a claim upon which relief can be granted against the defendant Yamashita Shinnihon Line.

AS A SECOND DEFENSE

SEVENTH: The injuries and/or illnesses to the plaintiff, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to the plaintiff at and before the said injuries and/or illnesses were sustained and all of the said risks, dangers and hazards had been assumed by plaintiff.

ANSWER AND CROSS COMPLAINT OF DEFENDANT YAMASHITA SHINNIHON LINE

AS A THIRD DEFENSE

EIGHTH: If the plaintiff sustained any injuries and/or illnesses as alleged in the complaint, said injuries and/or illnesses were caused in whole or in part by plaintiff's own negligence and were not caused or contributed to in any manner by any negligence of the defendant Yamashita Shinnihon Line.

AS AND FOR A CROSS CLAIM AGAINST DEFENDANTS M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., AND INTERNATIONAL TERMINAL OPERATING CO., INC.

NINTH: That at all times hereinafter mentioned, the defendant M. J. Rudolph Co., Inc. was engaged in the lighterage business.

TENTH: That at all times hereinafter mentioned the defendant M. J. Rudolph Corp. was engaged in the lighterage business.

ELEVENTH: That at all times hereinafter mentioned the defendant International Terminal Operating Co., Inc. (hereafter I.T.O.) was engaged in the stevedoring business.

TWELFTH: That at the time of the alleged accident to plaintiff, the third party defendant I.T.O., was aboard the YAMAWAKA MARU performing certain stevedoring work.

THIRTEENTH: That at the time of the alleged accident to the plaintiff, the defendant M. J. Rudolph Co., Inc.

had positioned its floating diesel crane rig known as #5-Rig alongside the YAMAWAKA MARU to engage in its lighterage business.

FOURTEENTH: That at the time of the alleged accidant of the plaintiff, the defendant M. J. Rudolph Corp., had positioned its floating diesel crane rig known as #5-Rig alongside the YAMAWAKA MARU to engage in its lighterage business.

FIFTEENTH: That defendant M. J. Rudolph Co., Inc., M.J. Rudolph Corp. and I.T.O. had agreed with Yamashita Shinnihon Line and were obligated to do their work in a proper and workmanlike manner.

SIXTEENTH: By holding itself out as an independent contractor and boarding the YAMAWAKA MARU, in that capacity, the defendant I.T.O. promised and warranted to the defendant Yamashita Shinnihon Line that it would perform said work aboard the YAMAWAKA MARU in a reasonably safe, careful, proper, prudent and workmanlike manner.

SEVENTEENTH: By holding itself out as an independent contractor, and undertaking to load the YAMAWAKA MARU in the capacity, defendant M. J. Rudolph Co., Inc promised and warranted to the defendant Yamashita Shinnihon Line that it would perform said work aboard the YAMAWAKA MARU in a reasonably safe, careful, proper, prudent and workmanlike manner.

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ANSWER AND CROSS COMPLAINT OF DEFENDANT YAMASHITA SHINNIHON LINE

EIGHTEENTH: By holding itself out as an independent contractor, and undertaking to load the YAMAWAKA MARU in that capacity, defendant M. J. Rudolph Corp. promised and warranted to the defendant Yamashita Shinnihon Line that it would perform said work aboard the YAMAWAKA MARU in a reasonably safe, careful, proper, prudent and workmanlike manner.

NINETEENTH: If plaintiff was injured as alleged in the complaint, which is expressly denied, said injuries were caused by the affirmative and active negligence of the defendants M. J. Rudolph Co., inc., M. J. Rudolph Corp. and I.T.O. and if defendant Yamashita Shinnihon Line was negligent in any manner, which is expressly denied, the negligence of the defendant Yamashita Shinnihon Line was entirely passive.

TWENTIETH: If the plaintiff was injured as alleged in the complaint, which is expressly denied, said injuries were caused by the breach by the defendants', M. J. Rudolph Co., Inc., M. J. Rudolph Corp. and I.T.O. obligations and warranties to perform workmanlike service and by the breach of their other contractual obligations and by the failure of the defendants M. J. Rudolph Co., Inc., M. J. Rudolph Corp., and I.T.O. to perform their work aboard the YAMAWAKA MARU in a reasonably safe, careful, proper, prudent and workmanlike manner.

ANSWER AND CROSS COMPLAINT OF DEFENDANT YAMASHITA SHINNIHON LINE

WHEREFORE, defendant Yamashita Shinnihon Line demands judgment dismissing the complaint, together with costs and disbursements, and that it be indemnified by the defendants M. J. Rudolph Co., Inc., M. J. Rudolph Corp. and/or I.T.O. for the costs, disbursements, counsel fees and other expenses incurred in the defense of this action, and, in the event judgment is recovered against the defendant Yamashita Shinnihon Line, that it have judgment over and against, or be indemnified for the full amount thereof by the defendants M. J. Rudolph Co., Inc., M. J. Rudolph Corp. and/or I.T.O., in addition to costs, disbursements, counsel fees, and other expenses incurred in the defense of this action and that the defendant Yamashita Shinnihon Line have such other, further and different relief as the justice of this cause may require.

Dated: New York, New York
NOV 22 1972 1972.

KIRLIN, CAMPBELL & KEATING

BY: JAMES R. CAMPBELL
A Member of the Firm
Attorneys for Defendant
Yamashita Shinnihon Line
Office & P.O. Address
120 Broadway
New York, New York 10005

ANSWER AND CROSS COMPLAINT OF DEFENDANT YAMASHITA SHINNIHON LINE

TO: CORCORAN AND BRADY, ESQS.
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11 Park Place
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D'AMATO, COSTELLO & SHEA, ESQS.
Attorneys for Defendants M. J.
Rudolph Co., Inc. and M. J. Rudolph Corp.
116 John Street
New York, New York 10038

FOGARTY, NIELSEN, McLAUGHLIN & SEMEL, ESQS.
Attorneys for co-defendant
International Terminal Operating Co., Inc.
10 Rockefeller Plaza
New York, New York 10020

ANSWER AND CROSS COMPLAINT OF DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO., INC.

UNITED STATES DISTRICT COURT ca
SOUTHERN DISTRICT OF NEW YORK
--X 72 CIV. 1782
WILLIAM McSWEENEY,

Plaintiff,

-against-

M. J. RUDOLPH CO.,INC., M. J. RUDOLPH CORP.,
KAWASAKI-KISEN-KAISHA, LTD. and
INTERNATIONAL TERMINAL OPERATING CO.,INC.,

Defendants.
--X

ANSWER WITH CROSS-CLAIM

DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO.,INC., DEMANDS TRIAL BY JURY

INTERNATIONAL TERMINAL OPERATING CO.,INC., one of the defendants above named, appearing by FOGARTY, NIELSEN, McLAUGHLIN & SEMEL, its attorneys, as and for its separate answer to the complaint of the plaintiff herein:

ANSWER TO FIRST CAUSE OF ACTION

FIRST: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs designated "1", "2", "4", "5", "6", "7", "8", "9", "10" and "11" of the complaint.

SECOND: Denies upon information and belief each and every allegation contained in paragraphs designated "12", "13", "14", "15", "16", "17" and "18" of the complaint.

ANSWER AND CROSS COMPLAINT OF DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO., INC.

ANSWER TO SECOND CAUSE OF ACTION

THIRD: Defendant repeats and reiterates all of the admissions and denials contained in the foregoing answer, with reference to those paragraphs repeated and reiterated in paragraphs designated "19", "22" and "23" of the complaint.

FOURTH: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph designated "20" of the complaint.

FIFTH: Denies upon information and belief each and every allegation contained in paragraphs designated "21", "24", "25" and "26" of the complaint.

ANSWER TO THIRD CAUSE OF ACTION

SIXTH: Defendant repeats and reiterates all of the admissions and denials contained in the foregoing answer, with reference to those paragraphs repeated and reiterated in paragraphs designated "27", "30" and "33" of the complaint.

SEVENTH: Denies upon information and belief each and every allegation contained in paragraphs designated "28", "29", "31" and "32" of the complaint.

ANSWER AND CROSS COMPLAINT OF DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO., INC.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT OF THE PLAINTIFF HEREIN, DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO., INC., ALLEGES UPON INFORMATION AND BELIEF:

EIGHTH: That whatever injuries plaintiff may have sustained at the time and place alleged in the complaint were caused in whole or in part or were contributed to by the negligence, fault and want of care on the part of plaintiff.

AS AND FOR CROSS-CLAIM AGAINST CO-DEFENDANTS, M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., and KAWASAKI-KISEN-KAISHA, LTD., DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO., INC., ALLEGES:

NINTH: That if the plaintiff had indeed sustained any injury at the time and place and in the manner set forth in the complaint by reason of any negligence or fault other than his own, then and in that event, said injury was caused solely by defendants, M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., and/or Yamashita Shinnihon Line **KAWASAKI-KISEN-KAISHA, LTD., by reason of their primary, active and affirmative negligence, without any negligence or fault on the part of INTERNATIONAL TERMINAL OPERATING CO., INC.'s contributing thereto; by reason of their breach of contract and warranty of workmanlike performance; and by reason of their causing, permitting and allowing the unseaworthy condition of which plaintiff complains.**

WHEREFORE, defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., demands judgment dismissing the complaint of the plaintiff, together with costs and disbursements of the action; or in the event that it be adjudged liable to the plaintiff, defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., demands that it then be granted judgment over against the defendants, M. J. RUDOLPH CO., INC., M. J. RUDOLPH CORP., and/or KAWASAKI-KISEN-KAISHA, LTD., together with reasonable attorneys' fees and expenses in addition to the costs and disbursements of this action, and that defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., have such other and different relief as the justice of the cause may require.

FOGARTY, NIELSEN, McLAUGHLIN & SEMEL
Attorneys for defendant INTERNATIONAL
TERMINAL OPERATING CO., INC.
OFFICE & P.O. ADDRESS
10 Rockefeller Plaza
New York, New York 10020

BY: James D. Hockett
JAMES D. HOCKETT

An Associate of the Firm

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF.

UNITED STATES DISTRICT COURT ca
SOUTHERN DISTRICT OF NEW YORK
---X 72 CIV. 1782
WILLIAM McSWEENEY,

Plaintiff,

-against-

M.J. RUDOLPH CO.,INC., M.J. RUDOLPH CORP.,
KAWASAKI-KISEN-KAISHA, LTD., and INTERROGATORIES
INTERNATIONAL TERMINAL OPERATING CO.,INC.,

Defendants.
---X

PLEASE TAKE NOTICE, that the plaintiff is hereby required to answer the following enumerated interrogatories under oath pursuant to the provisions of the Rule 33 of Rules of Civil Procedures for the District Courts of the United States as amended:

INTERROGATORIES PROPOUNDED TO THE PLAINTIFF TO BE ANSWERED BY HIM IN WRITING AND UNDER OATH. THE DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO.,INC., DEMANDS THAT IF THE PLAINTIFF AND/OR HIS ATTORNEYS ACQUIRE ANY FURTHER INFORMATION RELEVANT TO THESE INTERROGATORIES EMBODYING SAID INFORMATION BE FORWARDED IMMEDIATELY TO THE ATTORNEYS FOR THE DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO.,INC.

1. State: (a) your full name (b) date of birth (c) place of birth.

2. Have you ever been known by any other name? If your answer is "yes", state whatever name or names.

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DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

3. List all illnesses and injuries which you have sustained, both physical and mental during childhood and adulthood, giving the dates and duration of each illness or injury, and give the names and addresses of all doctors and hospitals by whom and at which you were treated.

4. State whether you are married or single.

5. State whether you have ever been confined to any hospital, including any medical or mental institution. If your answer is "yes", state the date or dates of such confinement or confinements and the reason or reasons therefor.

6. State (a) whether you have ever been in any military service (b) if your answer is "yes", give the branch of service, the serial number or numbers and the type or types of discharge therefrom.

7. If the answer is "yes" to the foregoing interrogatory, state (a) whether you have ever suffered any illnesses or injuries while in the service (b) the nature of each illness or injury, and (c) whether hospitalized therefor and the duration of such hospitalization.

8. State whether you have ever had any prior law suits. If your answer is "yes", state (a) the nature of the law suit (b) the court in which it was brought, and (c) the disposition of the claim.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

9. State whether you have ever been arrested or convicted of a crime. If your answer to the foregoing is "yes", give the date of each arrest and/or conviction, the nature of the charge, and the disposition of each charge.

10. State whether you possess a chauffeur's or an operator's driving license. If your answer is "yes", state where such license was issued, when it was issued and the number thereof.

11. (a) State whether you owned a motor vehicle for a period of two (2) years before the accident in suit. (b) If the answer to subdivision (a) is in the affirmative, please state the name of the person in whose name the motor vehicle was registered. (c) The place where the motor vehicle was registered and the registration number.

12. State what plaintiff was doing at the time of the alleged accident.

13. Give the date, hour and minute, so nearly as may be stated, at which the plaintiff claims to have been injured.

14. State how the plaintiff claims the alleged accident happened.

15. State the specific location on the vessel where it will be claimed the accident occurred giving direction and distance from some reasonably identifiable specified location in sufficient detail to permit ready identification of the location of the accident.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

16. If the plaintiff claims that there were any apparent or latent dangers of which he should have received warning, state what said dangers were, describing them particularly sufficient for identification.

17. If it is claimed that the said dangers could have been discovered upon a reasonable inspection, state what inspection or means of ascertaining the said dangers it is claimed should have been conducted.

18. If the plaintiff makes any other claims of negligence, state each and every such claim specifically.

19. (a) Name or otherwise identify each officer and agent and/or employee through whose negligence it is claimed plaintiff was caused to be injured. (b) State the respect and particular in which he claims each was negligent.

20. State how long on account of the injuries for which plaintiff asserts he was: (a) confined to the hospital (b) confined to his bed, and (c) confined to his home, and (d) unable to work.

21. Give a statement of each and every injury which it is claimed plaintiff sustained giving the name, location, extent and duration of each injury and which, if any, is claimed to be permanent.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

22. State the amount of money it is claimed that has been expended for medical attention and medicine on account of the injuries for which he claims and to what extent he has become indebted for these items, if at all.

23. (a) State the amount of money it is claimed that has been lost which he otherwise would have earned because of the injuries.

24. Give the date upon which plaintiff returned to work after the alleged injury, his capacity in such employment, the name and address of his employer or employers, the number of hours of duty per day and the number of days per week he worked or works.

25. Have you obtained unemployment insurance for any period of time since your alleged injury, and, if so.,state the amounts you have received, the dates you received the benefits and the place from where you received the benefits.

26. Please give the names and addresses of all physicians, or other persons, who examined, attended or treated you since November 14, 1970.

27. Please state the number of consultations or treatments referred to in the foregoing interrogatory, the date of each, by whom each was made, and which of the treatments were at your home, which were in a hospital, and which were at the office of a physician.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

If, at the present time, you are under the care of any doctor, please state:

(a) the name of the doctor;
(b) the date of your last treatment by him;
(c) the nature of the treatment, and
(d) the diagnosis made by him.

28. (a) State the name and address of each hospital at which plaintiff received treatment for his alleged injuries and (b) indicate which treatments were received as an in-patient and which as an out-patient. (c) If an in-patient, give the date he was admitted and the date he was discharged. (d) If an out-patient, give the date of commencement of his treatment, the date of each treatment, and the date he was discharged.

29. If plaintiff is now suffering or has any present illness and/or injury as a result of said occurrence, please describe the same in detail, stating the parts of his body affected, and the manner in which his illness and/or injury manifests itself.

30. (a) If since returning to work plaintiff has been laid off or has been incapacitated or lost any time, please give the dates between which he was incapacitated in each instance. (b) Please state whether he claims his inability to work on any of those dates was due to the occurrence.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

31. If his answer to subdivision (b) of the foregoing interrogatory, numbered 30, is in the affirmative, please state: (a) whether he received treatment of any kind on any of the days he was incapacitated; (b) the names of all persons who treated him on each occasion; (c) what was done for him on each occasion, and (d) the nature of the ailment or disorder for which he was treated on each occasion.

32. Please state the names and addresses of all persons, firms or corporations by whom you have been employed in any capacity since November 14, 1970, and give the names of the ships on which you have worked, if any.

33. Please state the periods of time, giving dates, between which you have been employed or during which you performed services of any nature, as described in your answer to the foregoing interrogatory, numbered 32; and the character of the services rendered by you; and the wages, salaries or compensation received by you for said labor or service.

34. If, since November 14, 1970, you have received income from any source other than the employment stated in your answers to the foregoing interrogatories, numbered 32 and 33, then please set forth:

(a) the nature of said income;
(b) each occasion you received any such income;
(c) the date you received it;
(d) the amounts you received; and
(e) from whom it was received.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

35. Please state the names and addresses of all persons, frims or corporations by whom you have been employed in any capacity for a period of five years prior to your alleged accident.

36. Please state the periods of time, giving dates, between which you have been employed or during which you performed services of any nature, as described in your answer to interrogatory numbered 35; the character of the services rendered by you; and the wages, salaries or compensation received by you for said labor or services.

37. If for the period of five years prior to your alleged accident you received income from any source other than employments stated in your answers to the foregoing interrogatories numbered 35 and 36, then please set forth:

(a) the nature of said income;
(b) each occasion you received any such income;
(c) the date you received it;
(d) the amounts you received; and
(e) from whom it was received.

38. State the amount of income from working you reported to the Income Tax Departments, both Federal and State, for each year since your alleged accident.

39. State the amount of income from working you reported to the Income Tax Departments, both Federal and State, for each year covering a period of five years preceding your alleged accident.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

40. (a) Please state whether you have been given any physical examinations of any kind since the 14th of November, 1970. (b) If so, state when and where you were physically examined, the name and address of each doctor or examiner, and the result of each physical examination.

41. (a) If you were given or received any physical examination, pre-employment or otherwise, since November 14, 1970, state whether you informed the doctor or examiner about the injuries . (b) If you told the doctor examiner that you are still suffering pain or disability as a result of the occurrence alleged, set forth what was said by you and what was said by the doctor or examiner.

42. If you have had any accidents, injuries, illnesses, diseases or operations since November 14, 1970, please state the nature of such, how you sustained the same and the names and addresses of all physicians, surgeons and other persons who have examined you or rendered services to you for said accidents, illnesses, injuries, diseases or operations, and the names and addresses of the hospitals at which you received treatment, giving the date you were admitted, the date of each treatment and the date you were discharged.

43. Have you had or made any other claim or claims for personal injuries or illnesses against any persons or corporations either prior to or since the date of the accident alleged in your complaint?

If so, kindly state the date of the injury which was the basis of such claim, the nature of the said injury, and the name of each person or corporation against whom said claim was made.

44. State whether plaintiff or anyone acting on his behalf, caused any investigation to be made with reference to plaintiff's alleged accident.

45. If your answer to the preceding interrogatory, numbered 44, is in the affirmative, state: (a) when the investigation was made; (b) the names, addresses, ratings and employers of all persons that were interviewed in connection with such investigation; (c) state whether the plaintiff or anyone acting on his behalf, obtained statements from any such persons, and if so specify those which were oral and those which were in writing; and the dates there of.

46. Did plaintiff or anyone acting on his behalf, obtain any statements in regard to plaintiff's alleged accident.

47. If the answer to the preceding interrogatory, numbered 46, is in the affirmative, state: (a) the name and address of the person or persons by whom they were made; (b) when they were made; (c) the name and address of the person by whom they were taken; (d) which of those statements were oral; (e) which were in writing, and (f) as to those statements which are written, state: (1) where they are presently located, and (2) are they signed or unsigned.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

48. State the names and addresses or identify any other persons that were interviewed by or in behalf of plaintiff in regard to the circumstances surrounding plaintiff's alleged accident.

49. StAte the exact name and address of your employer on November 14, 1970.

50. State in what capacity you were so employed.

51. State the title of your position in such employment.

52. State your general duties in such capacity.

53. State what specific duties you were performing at the time of the alleged accident.

54. State whether the plaintiff made a claim for Workmen's Compensation as a result of the alleged accident on November 14, 1970.

55. If the answer to the preceding interrogatory, numbered 54, is in the affirmative, state: (a) whether the claim was under a state or federal act, and (b) the outcome of such claim.

56. State your Social Security Number.

57. Set forth the evidentiary facts upon which the plaintiff bases his claim for negligence.

58. State the name and address of plaintiff's foreman.

59. State the names and addresses of the plaintiff's fellow employees on the vessel on November 14, 1970.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO PLAINTIFF

60. State the time the plaintiff commenced work on the day of the alleged accident.

61. State wyat the duties of the plaintiff were from the time he arrived until the time of the alleged accident.

62. Set forth the evidentiary facts upon which the plaintiff bases his claim that the vessel was unseaworthy.

Dated: New York, N.Y.
July 20, 1972

SEE ANNEXED PAGE.

FOGARTY, NIELSEN, McLAUGHLIN & SEMEL
Attorneys for defendant INTERNATIONAL
TERMINAL OPERATING CO., INC.
Office & P.O. Address
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New York, N.Y. 10020

BY: James D. Hockett
JAMES D. HOCKETT

An Associate of the Firm

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KIRLIN, CAMPBELL & KEATING, ESQS.
Atttorneys for co-deft. KAWASAKI
OFFICE & P.O. ADDRESS
120 BROADWAY
N.Y.C.

D'AMATO, COSTELLO & SHEA, ESQS.
Attorneys for defts. RUDOLPH
OFFICE & P.O. ADDRESS
116 JOHN STREET
NEW YORK, N.Y. 10038

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT M. J. RUDOLPH CORP.

UNITED STATES DISTRICT COURT: ca
SOUTHERN DISTRICT OF NEW YORK

---X 72 CIV. 1782

WILLIAM McSWEENEY,

Plaintiff,

-against-

INTERROGATORIES

M.J. RUDOLPH CO.,INC., M.J. RUDOLPH CORP.,
KAWASAKI-KISEN-KAISHA, LTD., and
INTERNATIONAL TERMINAL OPERATING CO.,INC.,

Defendants.

---X

SIRS:

PLEASE TAKE NOTICE, that the defendant, M.J. RUDOLPH CORP., is hereby required to answer the following emmerated interrogatories under oath pursuant to the provisions of Rule 33 of the Rules of Civil Procedure for the District Courts of the United States as amended:

1. Identify specifically the person, firm or corporation that owned the vessels S/s "KAWASAKI" and "FLOATING DIESEL CRANE RIG" (A/K/A "#5-Rig"), on November 14, 1970.

2. State whether the vessels were berthed at the time of the accident for the purpose of discharging or loading cargo, and specify which it was.

3. State whether the co-defendants, M.J.RUDOLPH CORP. and/or KAWASAKI-KISEN-KAISHA,LTD., made an agreement in writing with the defendant INTERNATIONAL TERMINAL OPERATING CO.,INC. to perform

services aboard the vessels. If so, state fully the terms and conditions of the agreement, or in the alternative, annex a facsimile of the agreement of the answers to these interrogatories.

4. State whether any log book entry was made with respect to the accident referred to in the plaintiff's complaint. If so, state:

a. The name, current post office address, or if unknown, the last known residence or location, including city, state or county, the title or job classification of the person making and signing such entry in the log.

b. Identify giving name and post office address, the person, firm or corporation having possession or control of the log book.

c. State fully and verbatim the relevant log book entries, or in the alternative, annex a facsimile of the entries to the answers to these interrogatories.

5. Identify by name and post office address or if unknown, the last known residence or location, all persons known or believed by the co-defendant, their representatives or anyone acting in their behalf, to be an eye witness to the accident.

6. As to any person from whom the co-defendant, M.J. RUDOLPH CORP., their representatives or anyone acting in their behalf, has obtained an interview, secured a statement or received a report state:

a) The identity giving name and post office address, or if unknown, the last known location or residence of each person from whom the interview, statement or report was obtained.

b) The specific subject matter of the interview, statement or report.

c) When each was obtained.

d) Where each was obtained.

e) The name and address of the person who obtained each interview, statement and report and the name and address of the respective employers of the persons who obtained the interview, statement and report, if not in the employ of the co-defendant.

f) Whether any recording, memorandum or permanent record of whatever nature or description, was made of any interview, statement or report.

g) Identify the interview, statement or report referred to in an affirmative answer to the preceding subdivision (f) and also identify the name and address of the person, firm or corporation having possession or control of each of them.

7. If it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO., INC. breached a warranty as to the performance of services state:

a) The exact date or dates and the time of day the breach occurred.

b) The specific services which were not performed in compliance with a warranty.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT M. J. RUDOLPH CORP.

c) The specific omission to act which constituted the breach of warranty.

8. If the claimed breach of warranty by the defendant INTERNATIONAL TERMINAL OPERATING CO.INC. occurred with respect to services involving cargo, describe the cargo sufficiently to permit reasonable identification and state the exact position of the cargo on the ship at the time of the plaintiff's accident.

9. As to the cargo described in answer to interrogatory number 8, state:

a) When it was stowed aboard the ship.

b) The exact location of the ship when the described cargo was stowed.

c) The exact location on the ship where the cargo was stowed.

d) The name and post office residence or if unknown, the last known residence or location of the person, firm or corporation that stowed cargo on the ship.

10. If it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO.,INC. improperly stowed cargo, describe exactly the manner and method of stowage which it is claimed was improper.

11. If it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO.,INC. was improperly unloading, or had improperly unloaded cargo, describe exactly the manner and method of unloading which it is claimed was improper.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT M. J. RUDOLPH CORP.

12. State each and every act and omission on the part of the plaintiff which the co-defendant M.J. RUDOLPH CORP. claims caused or contributed to the plaintiff's accident.

13. State whether the co-defendant M.J. RUDOLPH CORP. claims that any act or omission on the part of a fellow workman of the plaintiff caused or contributed to this accident. If so, state:

a) The name, address and title of such employee or employees.

b) Each and every act or omission on the part of such employee or employees which caused or contributed to the accident of the plaintiff.

14. Describe sufficiently to permit reasonable identification each and every defective condition which the co-defendant M.J. RUDOLPH CORP. claims the defendant caused or is primarily responsible for its existence or continuance, and which the co-defendant claims caused or contributed to the alleged accident to the plaintiff.

15. As to each of the conditions described in response to the foregoing interrogatory number 14, state which condition, if any, the co-defendant M.J. RUDOLPH CORP. claims the defendant INTERNATIONAL TERMINAL OPERATING CO., INC. had actual notice. As to such actual notice, state:

a) When actual notice was given.

b) Name and identify the individual to whom actual notice was given.

c) Name and identify the individual who gave actual notice.

d) Name and identify any person who was present at the time actual notice was given.

e) Describe specifically the manner in which actual notice was given.

16. With respect to each of the defective conditions described in answer to interrogatory 14, state which, if any, the plaintiff has claimed or the co-defendant M.J. RUDOLPH CORP. will claim made the vessel unseaworthy.

17. State whether the defendant INTERNATIONAL TERMINAL OPERATING CO., INC.'s liability is claimed to be the result of the negligent use of equipment or machinery while performing services aboard the vessel..

18. If the foreging interrogatory is answered in the affirmative:

a) Describe, sufficiently to permit reasonable identification, the equipment or machinery being used.

b) State the exat stevedoring service being perfomed with the equipment or machinery at the time of the accident.

c) State the exact location on the vessel of the equipment or machinery described.

d) Identify by name and address, including present whereabouts or last known post office address, giving street address, city, county and state, of the person or persons, operating or controlling the equipment or machinery described at the time of the accident.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT M. J. RUDOLPH CORP.

e) Identify by name and address all persons known or believed by the co-defendant M.J. RUDOLPH CORP., any of its representatives or anyone else acting on its behalf, to have first-hand knowledge or information of the facts and circumstances of the use of the equipment and machinery which caused or contributed to the plaintiff's accident.

19. State whether the defendant INTERNATIONAL TERMINAL OPERATING CO., INC.,'s liability is claimed to be the result of the use of defective equipment or machinery while performing services aboard the vessel.

20. If the foregoing interrogatory is answered in the affirmative, state:

a) Describe, sufficiently to permit reasonable identification of the equipment or machine which was defective.

b) State the exact stevedoring service being performed with the equipment or machinery described at the time of the accident.

c) Describe with particularity the portion or portions of the equipment or machine which were defective.

d) State the nature of the defective condition or the portion or portions described as causing or contributing to the accident.

e) State whether it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO.INC. had actual notice of the defective condition.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT M. J. RUDOLPH CORP.

f) If actual notice was writtne set forth a true copy.

g) If actual notice was oral, state its entire substance and by whom, to whom, when where and how given to the defendant.

h) State the length of time the defective condition existed prior to the occurrence of the plaintiff's accident.

i) State when the co-defendant M.J. RUDOLPH CORP., its representatives, or anyone acting on its behalf, first learned of the defective condition.

21. State whether the co-defendant M.J. RUDOLPH CORP., its representatives, or anyone actingon its behalf, first learned of the defective condition.

22. State whether the co-defendant M.J. RUDOLPH CORP., its representatives, or anyone acting on its behalf, had the described defective equipment or machine tested, analyzed or subjected to any inspections or examinations of any nature for any purpose whatever after the plaintiff's accident.

23. If the foregoing interrogatory is answered affirmatively, state:

a) Where the test or inspection was conducted.

b) When the test or inspection was conducted.

c) The identity, giving street address, city, county and state of the person, firm or corporation conducting the test or inspection.

d) Whether the co-defendant M.J. RUDOLPH CORP., its representatives, or anyone acting on its behalf, has in its possession or under its control a report of the test, inspection or examination.

24. State on what deck of the vessel and on what portion of that deck, the acts or omissions, or both, involving the defendant INTERNATIONAL TERMINAL OPERATING CO.,INC.'s Breach of Warranty occurred, giving the location and an approximate measurement, with respect to some specified location, sufficient detail to permit reasonable location of the place where the incidents constituting the breach of warranty occurred.

25. State the location on the ship where the plaintiff is known or believed to have sustained his accident, giving direction and distance, in an approximate measurement, from some specified location, in sufficient detail to permit reasonable identity of the accident /location.

26. State whether the co-defendant M.J. RUDOLPH CORP. , its representatives, or anyone acting in its behalf, at any time received any medical, hospital or x-ray reports, from any hospital or physician concerning the injuries to the plaintiff alleged to have been caused

by the accident? If so, state where and from whom such reports were received and indicate in lay language what each report disclosed with respect to the injuries and the consequences to the plaintiff.

27. State the identity and location, giving street address, city, county and state of any other person, firm or corporation, from whom the co-defendant M.J. RUDOLPH CORP., its representatives, or anyone acting in their behalf, had taken statements, written or oral, signed or unsigned, concerning the subject matter of any of the preceding interrogatories, who have not been identified in any response to any of the preceding interrogatories.

28. State the identity and location, giving street, address, city, county and state, of any other person, firm or corporation, known or believed by the co-defendant M.J. RUDOLPH CORP., its representatives, or anyone acting in their behalf, to have knowledge or information concerning the facts and circumstances relating to the accident, the injuries and damages sustained by the plaintiff, the breach of warranty by the defendant INTERNATIONAL TERMINAL OPERATING CO., INC., or any other relevant matter, who has not been identified in response to any of the preceding interrogatories.

29. Describe with sufficient detail to permit reasonable identification any and all documents, known or believed to be pertinent to the facts and circumstances disclosed in the answers to those inter-

rogatories, and state the identity and location, giving street address, city and county, and state, of any person, firm or corporation, known or believed, to have possession or control of the documents described.

30. State whether the co-defendant M.J. RUDOLPH CORP., its representatives, or anyone acting in their behalf, has photographs, reproductions, representations or mock-ups of machinery, equipment conditions or sites relevant to the occurrence; if so state:

a) The subject matter of it.

b) The name and post office address of the person, firm or corporation that made it.

c) The day, place and time it was made.

d) The name and post office address of the person, firm or corporation having custody of it.

Dated: New York, N.Y.
July 21, 1972

Yours &c.,

FOGARTY, NIELSEN, McLAUGHLIN & SEMEL
Attorneys for defendant INTERNATIONAL
TERMINAL OPERATING CO., INC.
Office & P.O. Address
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New York, New York 10020

BY: James D. Hockett
JAMES D. HOCKETT

An Associate of the Firm

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT M. J. RUDOLPH CORP.

TO:

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New York, New York

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT, YAMASHITA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X rk

WILLIAM McSWEENEY,

Plaintiff, 72 Civ. 1782

-against- INTERROGATORIES

M. J. RUDOLPH CO., INC.,
M. J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE and
INTERNATIONAL TERMINAL OPERATING
CO., INC.,

Defendants.
--X

SIRS:

PLEASE TAKE NOTICE that the defendant, YAMASHITA SHINNIHON LINE is hereby required to answer the following enumerated interrogatories under oath pursuant to the provisions of Rule 33 of the Rules of Civil Procedure for the District Courts of the United States as amended:

1. Identify specifically the person, firm or corporation who owned the vessels SS "YAMAWAKA MARU " and "FLOATING DIESEL CRANE RIG" (A/K/A "#5-Rig") on November 14, 1970.

2. State whether the vessels were berthed at the time of the accident for the purpose of discharging or loading cargo, and specify which it was.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO
DEFENDANT, YAMASHITA

3. State whether the co-defendants M.J. RUDOLPH CORP. and/or YAMASHITA SHINNIHON LINE made an agreement in writing with the defendant INTERNATIONAL TERMINAL OPERATING CO., Inc., to perform services aboard the vessels. If so, fully state the terms and conditions of the agreement, or in the alternative, annex a facsimile of the agreement of the answers to these interrogatories.

4. State whether any log book entry was made with respect to the accident referred to in the plaintiff's complaint; if so state:

a) The name, current post office address, or if unknown, the last known residence or location, including city, state or county, the title or job classification of the person making and signing such entry in the log.

b) Identify giving name and post office address, the person, firm or corporation having possession or control of the log book,

c) State fully and verbatim the relevant log book entries, or in the alternative, annex a facsimile of the entries to the answers to these interrogatories.

5. Identify by name and post office address or if unknown, the last known residence or location, all persons known or believed

by the co-defendant, their representatives or anyone acting in their behalf, to be an eye witness to the accident.

6. As to any person from whom the co-defendant YAMASHITA SHINNIHON LINE, their representatives or anyone acting in their behalf, has obtained an interview, secured a statement or received a report state:

a) The identity giving name and post office address, or if unknown, the last known location or residence of each person from whom the interview, statement or report was obtained.

b) The specific subject matter of the interview, statement or report.

c) When each was obtained.

d) Where each was obtained.

e) The name and address of the person who obtained each interview, statement and report and the name and address of the respective employers of the persons that obtained the interview, statement and report, if not in the employ of the co-defendant.

f) Whether any recording, memorandum or permanent record of whatever nature or description, was made of any interview, statement or report.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT, YAMASHITA

g) Identify the interview, statement or report referred to in an affirmative answer to the preceding subdivision (f) and also identify the name and address of the person, firm or corporation having possession or control of each of them.

7. If it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO., INC. breached a warranty as to the performance of services state:

a) The exact date or dates and the time of day the breach occurred.

b) The specific services which were not performed in compliance with a warranty.

c) The specific omission to act which constituted the breach of warranty.

8. If the claimed breach of warranty by the defendant INTERNATIONAL TERMINAL OPERATING CO., INC., occurred with respect to services involving cargo, describe the cargo sufficiently to permit reasonable identification and state the exact position of the cargo on the ship at the time of the plaintiff's accident.

9. As to the cargo described in answer to interrogatory number 8, state:

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT, YAMASHITA

a) When it was stowed aboard the ship.

b) The exact location of the ship when the described cargo was stowed.

c) The exact location on the ship where the cargo was stowed.

d) The name and post office residence or if unknown, the last known residence or location of the person, firm or corporation that stowed cargo on the ship.

10. If it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO., INC. improperly stowed cargo, describe exactly the manner and method of stowage which it is claimed was improper.

11. If it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO. INC. was improperly unloading, or had improperly unloaded cargo, describe exactly the manner and method of unloading which it is claimed was improper.

12. State each and every act and omission on the part of the plaintiff which the co-defendant YAMASHITA SHINNIHON LINE, claims caused or contributed to the plaintiff's accident.

13. State whether the co-defendant YAMASHITA SHINNIHON LINE claims that any act or omission on the part of a fellow workman of the plaintiff caused or contributed to this accident. If so, state:

a) The name, address and title of such employee or employees.

b) Each and every act or omission on the part of such employee or employees which caused or contributed to the accident to the plaintiff.

14. Describe sufficiently to permit reasonable identification each and every defective condition which the co-defendant YAMASHITA SHINNIHON LINE claims the defendant caused or is primarily responsible for its existence or continuance, and which the co-defendant claims caused or contributed to the alleged accident to the plaintiff.

15. As to each of the conditions described in response to the foregoing interrogatory number 14, state which condition, if any, the co-defendant YAMASHITA SHINNIHON LINE claims the defendant INTERNATIONAL TERMINAL OPERATING CO., INC. had actual notice. As to such actual notice, state:

a) When actual notice was given.

b) Name and identify the individual to whom actual notice was given.

c) Name and identify the individual that gave actual notice.

d) Name and identify any person that was present at the time actual notice was given.

e) Describe specifically the manner in which actual notice was given.

16. With respect to each of the defective conditions described in answer to interrogatory 14, state which, if any, the plaintiff has claimed or the co-defendant YAMASHITA SHINNIHON LINE will claim made the vessel unseaworthy.

17. State whether the defendant INTERNATIONAL TERMINAL OPERATING CO., INC'S. liability is claimed to be the resultof the negligent use of equipment or machinery while performing services aboard the vessel.

18. If the foregoing interrogatory is answered in the affirmative:

a) Describe, sufficiently to permit reasonable identification, the equipment or machinery being used.

b) State the exact stevedoring service being performed with the equipment or machinery at the time of the accident.

c) State the exact location on the vessel of theequipment or machinery described.

d) Identify by name and address, including present whereabouts or last known post office address, giving street address, city, county and state, of the person or persons, operating or controlling the equipment or machinery described at the time of the accident.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO
DEFENDANT, YAMASHITA

e) Identify by name and address all persons known or believed by the co-defendant YAMASHITA SHINNIHON LINE, any of its representatives or anyone else acting on its behalf, to have first-hand knowledge or information of the facts and circumstances of the use of the equipment and machinery which caused or contributed to the plaintiff's accident.

19. State whether the defendant INTERNATIONAL TERMINAL OPERATING CO., INC'S. liability is claimed to be the result of the use of defective equipment or machinery while performing services aboard the vessel.

20. If the foregoing interrogatory is answered in the affirmative, state:

a) Describe, sufficiently to permit reasonable identification theequipment or machine that was defective.

b) State the exact stevedoring service being performed with the equipment or machinery described at the time of the accident.

c) Describe with particularity the portion or portions of the equipment or machine that were defective.

d) State the natureof the defective condition on the portion or portions described as causing or contributing to the accident.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT, YAMASHITA

e) State whether it is claimed the defendant INTERNATIONAL TERMINAL OPERATING CO., INC., had actual notice of the defective condition.

f) If actual notice was written set forth a true copy.

g) If actual notice was oral, state its entire substance and by whom, to whom, when, where and how given to the defendant.

h) State the length of time the defective condition existed prior to the occurrence of the plaintiff's accident.

i) State when the co-defendant YAMASHITA SHINNIHON LINE, its representatives or anyone acting on its behalf, first learned of the defective condition.

21. State whether the co-defendant YAMASHITA SHINNIHON LINE, its representatives, or anyone acting on its behalf, first learned of the defective condition.

22. State whether the co-defendant YAMASHITA SHINNIHON LINE, its representatives or anyone acting on its behalf, had the described defective equipment or machine tested, analyzed or subjected to any inspection or examinations of any nature for any purpose whatever after the plaintiff's accident.

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DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO
DEFENDANT, YAMASHITA

23. If the foregoing interrogatory is answered affirmatively, state:

a) Where the test or inspection was conducted.

b) When the test or inspection was conducted.

c) The identity, giving street address, city, county and State of the person, firm or corporation conducting the test or inspection.

d) Whether the co-defendant YAMASHITA SHINNIHON LINE, its representatives or anyone acting on its behalf, has in its posession or under its control a report of the test, inspection or examination.

24. State on what deck of the vessel and on what portion of that deck, the acts or omissions, or both, involving the defendant INTERNATIONAL TERMINAL OPERATING CO., INC'S. breach of warranty occurred, giving the location and an approximate measurement, with respect to some specified location, sufficient detail to permit reasonable location of the place where the incidents constituting the breach of warranty occurred.

25. State the location on the ship where the plaintiff is known or believed to have sustained his accident, giving direction and distance, in an approximate measurement, from some specified location, in sufficient detail to permit reasonable identity of the accident location.

DEFENDANT INTERNATIONAL'S INTERROGATORIES ADDRESSED TO DEFENDANT, YAMASHITA

26. State whether the co-defendant YAMASHITA SHINNIHON LINE, its representatives or anyone acting on its behalf, at any time received any medical, hospital or X-ray reports, from any hospital or physician concerning the injuries to the plaintiff alleged to have been caused by the accident? If so, state where and from whom such reports were received and indicate in lay language what each report disclosed with respect to the injuries and the consequences to the plaintiff.

27. State the identity and location, giving street address, city, county and state of any other person, firm or corporation, from whom the co-defendant YAMASHITA SHINNIHON LINE, its representatives or anyone acting in their behalf, had taken statements, written or oral, signed, or unsigned, concerning the subject matter of any of the preceding interrogatories, who have not been identified in any response to any of the preceding interrogatories.

28. State the identity and location, giving street, address, city, county and state, of any other person, firm or corporation, known or believed by the co-defendant YAMASHITA SHINNIHON LINE, its representatives, or anyone acting in their behalf, to have knowledge or information concerning the facts and circumstances relating to the accident, the injuries and damages sustained by

the plaintiff, the breach of warranty by the defendant INTERNATIONAL TERMINAL OPERATING, CO., INC., or any other relevant matter, who has not been identified in response to any of the preceding interrogatories.

29. Describe with sufficient detail to permit reasonable identification any and all documents, known or believed to be pertinent to the facts and circumstances disclosed in the answers to those interrogatories, and state the identity and location, giving street address, city and county, and state, of any person, firm or corporation, known, or believed, to have possession or control of the documents described.

30. State whether the co-defendant YAMASHITA SHINNIHON LINE, its representatives, or anyone acting in their behalf, has photographs, reproductions, representations or mock-ups of machinery, equipment conditions or sites relevant to the occurrence; if so state:

a) The subject matter of it.

b) The name and post office address of the person, firm or corporation that made it.

c) The day, place and time it was made.

d) The name and post office address of the person, firm or corporation having custody of it.

Dated: New York, N.Y.
October 27, 1972

Yours &c.,

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Attorneys for Defendant
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By James D. Hockett
JAMES D. HOCKETT
An associate of the Firm

TO:

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DEFENDANT YAMASHITA'S INTERROGATORIES ADDRESSED TO PLAINTIFF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

WILLIAM McSWEENEY,

Plaintiff,

-against-

M. J. RUDOLPH CO., INC.,

M. J. RUDOLPH CORP.,

YAMASHITA SHINNIHON LINE and

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Defendants.

---x

INTERROGATORIES

72 Civil 1782

YAMASHITA SHINNIHON LINES
INTERROGATORIES ADDRESSED TO
PLAINTIFF TO BE ANSWERED IN
WRITING AND UNDER OATH

1. (a) Please state your residential address at the present time, including your apartment number.

2. Set forth the evidentiary facts upon which you base your claim for negligence.

3. (a) If you claim that any of the defendant's agents or employees were negligent, name or otherwise identify each such agent or employee and state in what respect each one named was negligent. (b) State how the negligence of each party named in subdivision (a) contributed to your injuries.

DEFENDANT YAMASHITA'S INTERROGATORIES ADDRESSED TO PLAINTIFF

4. Set forth the evidentiary facts upon which you base your claim that the vessel was unseaworthy.

5. State each and every injury and/or illness sustained by you for which you claim this defendant is responsible, giving the name, location, extent and duration of each injury and state which, if any, is claimed to be permanent.

6. State the amount of money you claim to have expended for medical attention and medicines on account of the injuries and/or illnesses for which you claim this defendant is responsible; and state to what extent you have become indebted for these items, if at all.

7. State how long on account of injuries and/or illnesses for which you claim this defendant is responsible, you were (a) confined to the hospital, (b) confined to bed; (c) confined to your home; and (d) unable to work, stating the inclusive dates of each period of time.

8. (a) State the amount of money you claim to have lost because of the injuries and/or illnesses for which you claim this defendant is responsible which you would otherwise have earned, and specify the job or jobs and the employer or employers at which or by whom it is claimed you would have been employed. (b) Set forth the exact period of time which was used in computing these lost earnings, the basis upon which this computation was made

including the hourly rate of pay, weekly rate of pay and days per week and the amount of overtime included, if any, and the number of hours of overtime.

9. State whether you have returned to work since your alleged injuries and if so, (a) give the name and address of each of your employers, (b) the periods of time you worked for each employer, (c) the nature of the work performed and (d) your weekly rate of base pay and your average weekly earnings in overtime.

10. (a) State whether you filed federal and/or state income tax returns for five years prior to your accident and for each year subsequent thereto. (b) If so, state the date and particular branch office at which each return was filed and the amount of income reported for each year.

11. Have you obtained unemployment insurance for any period of time since the occurrence alleged in your complaint, and, if so, state the amounts you have received, the dates you received the benefits and the place from where you received the benefits.

12. If you have received income from any source other than the employment stated in your prior answers, then (a) please set forth the nature of said income; (b) each occasion you received any such income; (c) the date you received it; the amounts you received; and (d) from whom it was received.

DEFENDANT YAMASHITA'S INTERROGATORIES ADDRESSED TO PLAINTIFF

13. (a) State the name and address of each hospital, if any, at which you received treatment for your alleged injuries and (b) indicate which treatments were received as an inpatient and which as an outpatient. (c) If an inpatient, give the date you were admitted and the date you were discharged. (d) If an outpatient, give the date your treatment commenced, the date of each treatment and the date you were discharged.

14. (a) Give the names and addresses of each physician or other persons who examined, attended or treated you as a result of the occurrence alleged in your complaint; (b) state the number of consultations or treatments, the date of each, by whom and where each was made and (c) identify those performed by any doctor to which your lawyer sent you.

15. (a) If since returning to work; you have been laid up or have been incapacitated or lost any time, please give the dates between which you were incapacitated in each instance. (b) Please state whether you claim your inability to work on any of those dates was due to the occurrence alleged in your complaint. If your answer to subdivision (b) of this interrogatory is in the affirmative, please state (c) whether you received treatment of any kind on any of the days you were incapacitated; (d) the names of all

persons who treated you on each occasion, (e) what was done for you on each occasion and the nature of the ailment or disorder for which you were treated on each occasion.

16. (a) State whether after the occurrence described in your complaint you sustained an accident of any kind regardless of whether it resulted in any disability to your person. If so, (b) please state the place of the accident; (c) the nature of the accident, (d) how it was sustained and (e) the names and addresses of any persons who were with you at the time. (f) If you were examined or treated, please give the names and addresses of all physicians, surgeons, or other persons who rendered service to you for said accident. (g) If you were treated at any hospital, please give the names and addresses of the hospitals at which you received treatment, giving the date you were admitted, the date of each treatment and the date you were discharged.

17. If you have had any illnesses, injuries, diseases or operations since the occurrence described in your complaint and which were not included in the answers to the above questions, please state the nature of each, how you sustained the same and the names and addresses of all physicians, surgeons, or other persons who have examined you or rendered services to you for said illnesses, injuries, diseases or operations and the names and addresses of the

hospitals at which you received treatment, giving the date you were admitted, the date of each treatment and the date you were discharged.

18. Have you had or made any claim or claims for personal injuries or illnesses since the date of the incident alleged in your complaint? If so, kindly state the date of the injury or illness which was the basis of such claim, the nature of said injury or illness, identify the person against whom said claim was or could have been made and the amount of money for which the claim was settled, and the amount of money you received.

19. (a) State whether before the occurrence described in your complaint you sustained an accident of any kind regardless of whether it resulted in any disability to your person. If so, (b) please state the place of the accident, (c) the nature of the accident, (d) how it was sustained, and (e) the names and addresses of any persons who were with you at the time. (f) If you were examined or treated, please give the names and addresses of all physicians, surgeons, or other persons who rendered service to you for said accident. (g) If you were treated at any hospital, please give the names and addresses of the hospitals at which you received treatment giving the date you were admitted, the date of each treatment and the date you were discharged.

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DEFENDANT YAMASHITA'S INTERROGATORIES ADDRESSED TO PLAINTIFF

20. If you have had any illnesses, injuries, diseases or operations before the occurrence described in your complaint, which were not included in the answers to the above questions, please state the nature of such, how you sustained the same and the names and addresses of all physicians, surgeons, or other persons who have examined you or rendered services to you for said illnesses, injuries, diseases or operations and the names and addresses of the hospitals at which you received treatment, giving the date you were admitted, the date of each treatment and the date you were discharged.

21. Have you had or made any claim or claims for personal injuries or illnesses against any person or corporation before the date of the incident alleged in your complaint? If so, kindly state the date of the injury or illness which was the basis of each claim, the nature of said injury or illness, identify the person against whom each claim was or could have been made, give the amount of money for which such claim was settled and the amount of money which you received.

22. (a) State whether suit was started for any of the claims referred to in your answers to the prior interrogatories. If so (b) please give the name of the court where each suit was started; (c) the title of each action;

(d) the index number of each action; (e) the name and address of all the attorneys whether of record or not, who represented you in each action; (f) state whether the suit is still pending; if not still pending (g) state the date it was discontinued or terminated.

23. (a) State the name and location of each person with whom you, your attorney or any other person acting for or in your interest, has been in communication concerning any facts relevant to the subject matter of this action and give the date of each communication and by whom it was made. (b) State the name and location of each person from whom you, your attorney or any other person acting for or in your interest, has obtained a statement in writing concerning the subject matter of this action and give the date each statement was obtained and by whom it was obtained.

24. Give the name and last known address or otherwise identify any person whom you claim to have been a witness to or has any knowledge with respect to the matters alleged in the complaint.

25. (a) Give the name and last known address of each person from whom you or your attorneys or anyone acting on your behalf has obtained written and/or oral statements in regard to the matters alleged in the complaint. (b) In each

case, state by whom the statement was taken, where and when it was taken, whether written or oral and the location of the written statements at the present time.

Dated: New York, New York

NOV 2 1972 1972.

KIRLIN, CAMPBELL & KEATING

BY: JAMES R. CAMPBELL
A Member of the Firm
Attorneys for Defendant
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PLAINTIFF'S REPLY TO INTERROGATORIES.

United States District Court
Southern District of New York
--------------------------------------X

WILLIAM McSWEENEY, :

Plaintiff
:
v.
:
M. J. RUDOLPH CO., INC., 72-1782
M. J. RUDOLPH CORP., :
YAMSHITA SHINNIHON LINE and
INTERNATIONAL TERMINAL OPERATING PLAINTIFF'S
CO., INC. : REPLY TO
INTERROGATORIES

Defendants
--------------------------------------X

MICHAEL McSWEENEY, erroneously described as WILLIAM McSWEENEY, for his Answers to the Interrogatories states under oath as follows:

1. (a) The Plaintiff's name is MICHAEL McSWEENEY.

(b) The Plaintiff was born on 2/10/38.

(c) Plaintiff was born at Irvington, New Jersey.

2. Plaintiff MICHAEL McSWEENEY has not been known by any other name. The name "WILLIAM" McSWEENEY is a typographical error.

3. Plaintiff underwent an appendectomy when he was about 12 years of age at Baby's Hospital in Newark, New Jersey; Plaintiff treated for sinus condition about

the age of ten years in Baby's Hospital, Newark, New Jersey; about five years ago pulled muscle on stomach when Plainti slipped on ladder while working for Employer, Rudolph; no hospitalization other than treatment by Doctor; no claim made. Plaintiff does not know names or addresses of doctors except those that treated him in the hospital and Doctors in the present case who are (1) Long Island College Hospital, 340 Henry St., Brooklyn, N.Y. on November 14, 1970; (2) Overlook Hospital, Summit, New Jersey, admitted on January 25, 1971; Treated by Dr. J.I. Cook of Overlook Hospital, Dr. R.P. Calallino, Radiologist at Overlook Hospital; Dr. Laval and Dr. G.N. Jeliner of Long Island College Hospital; Dr. John R. Gudelis, 2314 South Avenue, Scotch Plains, New Jersey; examined by Dr. Henry R. Liss, P.O. Box 536, Chatham, N.J., Westfield Orthopedic Group, 541 East Broad St., Westfield, New Jersey.

4. Plaintiff is married.

5. See answer to question 3 above.

6. (a) Plaintiff has not been in the military service.

PLAINTIFF'S REPLY TO INTERROGATORIES

7. See 6 above.

8. Plaintiff has had no prior law suits.

9. Plaintiff has not been arrested or convicted of any crime.

10. Plaintiff does not possess a chauffeur's or an operator's driving license except possesses a State of New Jersey driver license #M1753 54473 02386 issued 10/20/72 and expires 11/30/75.

11. (a) Plaintiff owned a motor vehicle for a period of two years before the accident in suit.

(b) The motor vehicle is registered in the name of Michael McSweeney.

(c) The motor vehicle was registered in Trenton, New Jersey and the registration number is 11 X 661.

12. Plaintiff at the time of the accident was observing the lowering of the load preparatory to / changing the rigging on Floating Crane "R-5" of the Defendant RUDOLPH.

13. The accident occurred on November 14, 1970 at 8:15 A.M.

14. While awaiting the movement of the 4 Part Block from the deck of the floating crane R-5

to the adjoining pier to enable the floating crane R-5 to lift a 25-ton container from the pier to the deck of the floating crane R-5, from whence it would be lifted to the S.S. YAMAWAKA MARU owned by the Defendant YAMASHITA SHINNIHON LINE, the Plaintiff placed his hands on the 4 Part Block as the same was being lowered in order to guide it to come to rest in a proper position to enable the Plaintiff to reeve the 4 Part Block so as to permit the R-5 and the S.S. YAMAWAKA MARU to continue its mission of hoisting, carriage and transportation; as soon as the load which was being lowered reached the altitude of the Plaintiff's hands, the Plaintiff's body was tugged and lurched forward and caused to be thrown with great force and violence and collapsed on the pier in excruciating pain with great injury to his back and inability to move or raise his body to a sitting or erect position.

15. The accident occurred in navigable waters while the lifting apparatus of theFloating Crane R-5 which was tied up to Pier 7, was lowering the 4-Part Block weighing approximately 1,000 pounds on to the northern end of the southside bulkhead of the Port of New York Authority, Pier 7, located at Brooklyn, N.Y.

PLAINTIFF'S REPLY TO INTERROGATORIES

16. The Plaintiff claims that the Defendants and each of them, through their servants, agents and employees, failed to warn the Plaintiff of the hazard and danger ensuing when the 4 Part Block weighing approximately 1,000 pounds was being moved from R-5 to the adjoining pier; The pier Superintendent, "JOE CHUCK" of the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC., directed the Plaintiff to change the rigging on the floating crane from a 2 Part Block to a 4 Part Block to enable the R-5 to safely lift the 25 ton Container from the Pier on to the deck of the R-5 from whence it would be lifted aboard the S.S. YAMAWAKA MARU owned by the Defendant YAMASHITA SHINNIHON LINE; in failing to warn the Plaintiff of the hazard of the load that was being lowered lurching forward and causing the Plaintiff to sustain a violent strain on his back and body causing him to collapse on the pier; in failing to wait for the waters in which the R-5 was floating to become calmer; the Defendant RUDOLPH and each of them was negligent in failing to have the rigging of the crane aboard the R-5 properly rigged with a block sufficient in strength to

lift a 25 Ton Container; the defendant YAMSHITA SHINNIHON LINE and its agent, INTERNATIONAL TERMINAL OPERATING CO., INC. were negligent in failing to inspect the rigging of the crane aboard the R-5 knowing that its agents, servants and employees were already atop of the 25 Ton Container which said agents, servants and employees were preparing to have the lifting apparatus hook on to the 4 corners of the said 25 Ton Container and aware of the fact that the 2 Part Block was insufficient to safely lift a 25 Ton load; in providing the vessel R-5 and its appurtenances in such a manner as to cause the same to be unseaworthy for the purposes intended; the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. failed to inspect the lifting certificate aboard the R-5 which would indicate that a 2 Part Block was unsafe to lift a 25 Ton Container and to cause the 2 Part Block to be changed to a 4 Part Block at a time and place where the same could have been achieved without injury to the Plaintiff.

17. The dangers could have been discovered by the Defendants and each of them by inspecting the Certificate aboard the R-5 which at the time was rigged with a 2 Part Block on the crane and which the Defendants

knew or should have known was insufficient to lift a 25 Ton Container; the Defendants were negligent in failing to inspect the ticket on the 25 Ton Container and to compare the specifications with the Certificate aboard the R-5, which is framed and hanging on the cabin wall.

18. Failure to provide Plaintiff with a safe place to work; providing unsafe vessel and appurtenances; directing the Plaintiff in the manner of performing his work under hazardous conditions created by said defendants; the urgency and speed demanded of the Plaintiff by the representatives of the Defendants including the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. to make the change from a 2 Part Block to a 4 Part Block hurriedly; the severe criticism of the Plaintiff by representatives of the Defendants to the effect that the floating crane R-5 owned and operated by the Defendants RUDOLPH was not set up properly for the heavy lifts of the container involved and hollering "You guys didn't do anything at all yesterday and now you are not able to go ahead"; failure of the Defendants to check on the weight of the cargo containers to be hoisted to make certain adequate time and apparatus were available and not to

pressure the Plaintiff despite the fact Plaintiff was not working on the "R-5" the day before; in providing inadequate, incompetent help and assistance to the Plaintiff, lulling the Plaintiff into a sense of security and safety;

19. (a) Joe Chuck and "Joe the Harbor Master", only name by which the Plaintiff knew him, employee of the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. and Chief Mate and /agents of the Defendant YAMSHITA SHINNIHON LINE who owned and controlled the S.S. YAMAWAKA MARU; The Defendants RUDOLPH knew or should have known of the nature of the lift to be made and failed to inform or instruct the Plaintiff where and how the necessary change in the rigging from a 2 Part to a 4 Part Block could be accomplished safely and without hazard to the Plaintiff; in failing to provide the R-5 with a guide line to guide the hoisting and lowering of the load from the deck of R-5 to the pier and vice versa; the Defendants RUDOLPH knew that the R-5 had worked only part of a day prior to the 14th day of November 1970 and knew or should have known the purposes for which the R-5 and its

appurtenances and rigging would be used on the following day having in mind the inclement weather which caused the cancellation of loading operations and failed to make provisions for the change of rigging at a time when the inclement weather and swells of the seas would not be present. The Chief Mate and Officers of the S.S. YAMAWAKA MARU knew of the stowage plan and failed to take steps to provide gear and tackle and supervision for safe loading.

20. The Plaintiff by reason of his injuries (a) was confined to Long Island College Hospital for part of one day and to Overlook Hospital for ten days; (c) Plaintiff was confined to his home for approximately 14 weeks and (d) Plaintiff was unable to work for 16 weeks at regular duties and was on light duty for an additional four weeks, making a total of twenty (20) weeks.

21. Plaintiff sustained injury to his low back accompanied by a twisting and severe pain which was knife like in nature causing him to fall and collapse with severe disability; Plaintiff was removed to Long Island College Hospital by ambulance with findings of pain in the lumbo-sacral area; plaintiff suffered considerable lumbo-sacral limitation of motion and paravertebral spasm with tenderness in the PSIS region;

PLAINTIFF'S REPLY TO INTERROGATORIES

Plaintiff suffered a meralgia paresthetica which was present on the left side; Plaintiff was placed on Parafon Forte along with Dilatid for the severe pain he was suffering; Plaintiff continued to suffer severe lumbo-sacral discomfit which prevented him from riding in an automobile; in addition to the limitation of back movement, Plaintiff was restricted in the movement of his neck accompanied by pain; Plaintiff had discomfit and restriction of movement in both extremities particularly the outer side of his thighs; Plaintiff was required to utilize a lumbo-sacral support and to continue with physical therapy; Plaintiff suffered an irregularity of the C-5 vertebral body over its anterior-inferior surface with narrowing at the L-5, S-1 in the lower back and flattening of the lumbar curvature; Plaintiff was subjected to continuous diathermy in efforts to lessen the pain and discomfit in the lumbar sacrol region; Plaintiff suffers from restriction of the left arm and left side of the neck, numbness of the fingers of the left hand and toes of the left foot which restriction continues up to the present time and are claimed to be permanent.

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PLAINTIFF'S REPLY TO INTERROGATORIES

22. Long Island College Hospital $57.95; Westfield Orthopedic Group, Charted, 541 East Broad St., Westfield, New Jersey, $430.00; Overlook Hospital, $692. Dr. Liss, $45; Dr. DeGulis, $25; Drugs, prescriptions and medicines $50 approximately and Back Support, $26.00, payment for which support was advanced by the Defendants RUDOLPH who also advanced $25 toward the pharmacy bill.

23. (a) Plaintiff was making an average of $300 a week plus overtime and the total approximated $7,000 in loss of earnings including additional time lost of 1 week in December 1971.

24. Plaintiff returned to work for Defendants RUDOLPH on March 1, 1971 in light duty capacity in the employer's yard and at times aboard the floating vessels of Defendants RUDOLPH when said vessels were tied up and not performing usual work. Employer is M. J. RUDOLPH CORP., 8 Sackett St., Brooklyn, New York; when performing light work, plaintiff worked 7 hours and 5 days per week; on light duty for approximately one month.

25. Plaintiff did not obtain unemployment insurance for any period of time since the alleged injury.

26. See above.

27. The number of consultations between doctors are unknown to the Plaintiff; treatment at the hospital consisted of the Plaintiff being placed in traction and therapy twice a day in the hospital as well as neck traction over a period of ten days; at home the treatment consisted of injection for pain by Dr. Gudelis; medication for pain given by Dr. Cook for home treatment; at present occasionally the Plaintiff goes to Westfield Orthopedic Group, on June 1, 2, 5 and 9, 1972; Dec. 8, 13, 15 1971.

28. (a) See answers to above. In all hospital confinement of Plaintiff was as an in-patient; he was treated as an out-patient by Westfield Orthopedic Group; from Nov. 14, 1970 to Jan. 25, 1971 Plaintiff treated as an out-patient by Westfield Orthopedic Group; In-patient at Overlook Hospital from Jan. 25, 1971 to February 2, 1971.

29. Plaintiff continues to suffer restriction of movement of lower back with accompanying pain; numbness of fingers of left hand and numbness of toes of left foot; restriction of movement of neck with

accompanying pain; pains in left leg; above manifests itself during the day from the time Plaintiff arises in the morning, which restriction and pain becomes aggravated and greater as the day continues; or when he exerts himself in any type of work which heretofore did not cause restriction or pain.

30. (a) No.

(b) Disability and loss of earnings during the week of December 1971 is claimed to be due to the accident.

31. (a) Yes - three therapy treatments at Westfield Orthopedic Group Clinic;

(b) Therapist - name unknown;

(c) Application of heat treatment to neck and back;

(d) Restriction and pain of back, leg, toes, fingers and neck.

32. M. J. RUDOLPH - on different floating cranes, loading and unloading vessels whose names are not known to Plaintiff in Ports of New York and New Jersey.

33. Plaintiff worked as Crane Operator - wages approximately $72 per day or $360 per week - straight time, employed by M. J. Rudolph.

34. None, except $8 a day or $56 a week for 16 weeks for maintenance and care as a seaman during the period immediately following the accident.

35. M. J. Rudolph.

36. Plaintiff performed usual services of oiler for M. J. Rudolph, averaging $15,000 per year during said five (5) years prior to date of accident.

37. No other source of income.

38. Since accident of November 14, 1970 Plaintiff reported $17,000 approximately with loss of six weeks in November, December 1970 due to the accident, for 1970; approximately $17,500 for 1971 with loss of ten (10) weeks earnings in 1971; the earnings for 1972 not yet filed.

39. See answer to Question 36.

40. (a) Yes

(b) Overlook Hospital by Dr. Liss and Dr. Cook with results as reported on hospital chart.

41. (a) Informed doctors mentioned in 40(a) and (b).

(b) Plaintiff complained of pain, muscle spasm and restriction of movement of lower back, fingers of left hand and toes of left foot, restriction

PLAINTIFF'S REPLY TO INTERROGATORIES

of neck; informed by Dr. Cook that Plaintiff injured back and spinal area as a result of pulling accident while at work causing muscular injury; Plaintiff being treated with only partial improvement and Plaintiff developing more neck complaints of more recent note. Dr. Cook informed the Plaintiff shortly before returning to work that Plaintiff could not do heavy physical work or labor and that if he stayed away from heavy work the condition may not worsen and recommended that Plaintiff discontinue the type of work he has been doing heretofore and which is his only means of livelihood and which Dr. Cook suggested he limit his duties to work of supervisory character.

42. No.

43. Yes, except made no claim for injury to cut on nose and glass in eye when a seaman threw beer bottle on deck of Black Diamond Line,ship and carrier's agent offered me a settlement of $600 from the owner or agents of the Line and which moneys were used to pay medical bills and for pain and suffering; this incident occurred about seven years ago.

44. Yes.

PLAINTIFF'S REPLY TO INTERROGATORIES

45. (a), (b), (c) - answers declined on the ground that the same are the work products of my Attorneys and also on the ground that the same is privileged between my Attorneys and myself.

46. The Plaintiff did not obtain any statements with regard to the Plaintiff's accident; any information obtained by my attorneys is the work product of my lawyer and hence privileged.

47. See above.

48. See answer to "46" above.

49. Plaintiff was employed by M. J. Rudolph on November 14, 1970.

50. Plaintiff was employed as an Oiler.

51. See answer to 50 above.

52. Plaintiff's duties were to oil and grease equipment aboard the floating vessels of the Employer and to change rigging when necessary, assist in guiding loads being hoisted and lifted.

53. See above.

54. No.

55. Plaintiff received $56 maintenance and care.

56. Plaintiff's social security number is 137-28-9637.

PLAINTIFF'S REPLY TO INTERROGATORIES

57. See answers to paragraphs above numbered 14, 15, 16, 17, 18 and 19(a).

58. Plaintiff has no foreman as such; Mr. Rudolph, 8 Sackett St., Brooklyn, N.Y. is his employer and boss, except that Anthony Famulaor is the bulk stevedoring foreman.

59. Peter Munsinger, Brooklyn, New York (exact address unknown).

60. Plaintiff started work at 8 A.M. on the day of the accident.

61. Plaintiff's duties were to oil and grease and start engines.

62. See paragraphs above numbered 14, 15, 16, 17, 18, 19(a); The R-5 owned and operated by the Defendants RUDOLPH was unseaworthy in that it was not equipped at the time necessary in pursuit of its mission of loading the 25 ton containers aboard the S.S. YAMAWAKA MARU; the R-5 was unseaworthy in the failure to have its crane and rigging equipped with adequate appurtenances sufficient to safely lift and hoist the 25 ton containers from the pier to the deck of the R-5 and thence to the S.S. YAMAWAKA MARU; the S.S. YAMAWAKA MARU was unseaworthy

by reason of the fact that the occurrence took place in the midst and course of the S.S. YAMAWAKA MARU's loading container cargo operation; the S.S. YAMAWAKA MARU was unseaworthy in that the Defendants owning and controlling said vessel failed to inform its agent, the Defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., as well as the Defendants RUDOLPH of the type of bulk cargo that was to be lifted aboard its vessel, and to have adequate pier and lifting apparatus along with a competent crew and supervision to determine in advance that the hoisting gear of the R-5 was sufficient and adequate to perform the said lifting operations; the S.S. YAMAWAKA MARU was unseaworthy by reason of the lack of competent supervision rendered by the owners and those in control thereof having in mind the duties of the Plaintiff, among others, to handle the rig's lines during its docking and undocking operation at the time the R-5 was involved in the operation of loading the S.S. YAMAWAKA MARU.

The unsafe gear and tackle of the R-5 was was an extension of the loading gear and tackle of the S. S. YAMAWAKA MARU whose Chief Mate and Officers knowingly and negligently allowed and permitted the R-5 to engage in said loading with inadequate and insufficient blocking tackle, requiring a change to sufficient gear during which performance the Plaintiff was injured; in this connection there was a callous absence of the vessel's supervisory duties, aid and assistance having in mind the stowage plan which the S.S. YAMAWAKA MARU prepared itself or through its agents, the DEFENDANTS INTERNATIONAL TERMINAL OPERATING CO., INC. and M. J. RUDOLPH CO., INC. and M. J. RUDOLPH CORP., knew of the weight of the containers and the location where they were to be stowed aboard the vessel.

In these and related aspects, Plaintiff will claim the ship's officers were incompetent and the vessel unseaworthy and all of the foregoing were causally related to the occurrence for which claim is made.

Dated: New York, N.Y.
Dec. 21, 1972

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, N. Y. 10007
Tel: 227-2242

BY William Corcoran
WILLIAM J. CORCORAN
A Member of the Firm

PLAINTIFF'S REPLY TO INTERROGATORIES

TO:

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PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-------------------------------------X

WILLIAM McSWEENEY, **(True Name MICHAEL McSWEENEY)** : 72 Civ. 1782
Plaintiff
:
-against- : **PLAINTIFF'S** ANSWERS TO THE **INTERROGATORIES** PROPOUNDED BY **THE DEFENDANT** YAMASHITA SHINNIHON LINE

M. J. RUDOLPH CO., INC.,
M. J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE and
INTERNATIONAL TERMINAL OPERATING CO., INC.,

Defendants :
-------------------------------------X

The Plaintiff, by CORCORAN AND BRADY, ESQS., for his answers to the Interrogatories propounded by the Defendant YAMASHITA SHINNIHON LINE states under oath, as follows:

1. Residential address at the time of the occurrence and at present is 121 Patterson Road, Fanwood, New Jersey 07023.

2. The evidentiary facts upon which the Plaintiff bases his claim is as follows:

While awaiting the movement of the 4 Part Block from the deck of the floating crane R-5 to the adjoining pier to enable the floating crane R-5 to lift a 25-ton container from the pier to the deck of the floating crane R-5, from whence it would be lifted to the S.S. YAMAWAKA MARU owned by the Defendant YAMASHITA SHINNIHON LINE, the Plaintiff placed his hands on the 4 Part Block as the same was being lowered in order to guide it to come to rest in a proper position to enable the Plaintiff to reeve the 4 Part Block so as to permit the R-5 and the S.S. YAMAWAKA MARU to continue its mission of hoisting, carriage and transportation; as soon as the load which was being lowered reached the altitude of the Plaintiff's hands, the Plaintiff's body was tugged and lurched forward and caused to be thrown with great force and violence and collapsed on the pier in excrutiating pain with great injury to his back and inability to move or raise his body to a sitting or erect position.

The accident occurred in navigable waters while the lifting apparatus of the Floating Crane R-5 which was tied up to Pier 7, was lowering the 4-Part Block weighing approximately 1,000 pounds on to the northern end of the soutside bulkhead of the Port of New York Authority, Pier 7, located at Brooklyn, New York.

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

The Plaintiff claims that the Defendants and each of them, through their servants, agents and employees, failed to warn the Plaintiff of the hazard and danger ensuing when the 4 Part Block weighing approximately 1,000 pounds was being moved from R-5 to the adjoining pier; the pier Superintendent, "JOE CHUCK" of the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC., directed the Plaintiff to change the rigging on the floating crane from a 2 Part Block to a 4 Part Block to enable the R-5 to safely lift the 25 ton Container from the Pier on to the deck of the R-5 from whence it would be lifted aboard the S.S. YAMAWAKA MARU owned by the Defendant YAMASHITA SHINNIHON LINE: in failing to warn the Plaintiff of the hazard of the load that was being lowered lurching forward and causing the Plaintiff to sustain a violent strain on his back and body causing him to collapse on the pier; in failing to wait for the waters in which the R-5 was floating to become calmer; the Defendant RUDOLPH and each of them was negligent in failing to have the rigging of the crane aboard the R-5 properly rigged with a block sufficient in strength

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

to lift a 25 Ton Container; the Defendant YAMSHITA SHINNIHON LINE and itsagent, INTERNATIONAL TERMINAL OPERATING CO., INC. were negligent in failing to inspect the rigging of the crane aboard the R-5 knowing that its agents, servants, and employees were already atop of the 25 Ton Container which said agents, servants and employees were preparing to have the lifting apparatus hook on to the 4 corners of the said 25 Ton Container and aware of the fact that the 2 Part Block was insufficient to safely lift a 25 Ton load; in providing the vessel R-5 and its appurtenances in such a manner as to cause the same to be unseaworthy for the purposes intended; the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. failed to inspect the lifting certificate aboard the R-5 which would indicate that a 2 Part Block was unsafe to lift a 25 Ton Container and to cause the 2 Part Block to be changed to a 4 Part Block at a time and place where the same could have been achieved without injury to the Plaintiff.

The dangers could have been discovered by the Defendants and each of them by inspecting the Certificate aboard the R-5 which at the time was rigged with a

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

2 Part Block on the crane and which the Defendants knew or should have known was insufficient to lift a 25 Ton Container; the Defendants were negligent in failing to inspect the ticket on the 25 ton Container and to compare the specifications with the Certificate aboard the R-5, which is framed and hanging on the cabin wall.

The failure to provide Plaintiff with a safe place to work; providing unsafe vessel and appurtenances; directing the Plaintiff in the manner of peforming his work under hazardous conditions created by said defendants; the urgency and speed demanded of the Plaintiff by the representatives of the Defendants including the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. to make the change from a 2 Part Block to a 4 Part Block hurriedly; the severe criticism of the Plaintiff by representatives of the Defendants to the effect that the floating crane R-5 owned and operated by the Defendants RUDOLPH was not set up properly for the heavy lifts of the container involved and hollering "You guys didn't do anything at all yesterday and now you are not able to go ahead"; failure of the Defendants to

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

check on the weight of the cargo containers to be hoisted to make certain adequate time and apparatus were available and not to pressure the Plaintiff despite the fact Plaintiff was not working on the "R-5" the day before; in providing inadequate, incompetent help and assistance to the Plaintiff, lulling the Plaintiff into a sense of security and safety.

Joe Chuck and "Joe the Harbor Master", only name by which the Plaintiff knew him, employees of the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. and Chief Mate and agents of the Defendant YAMSHITA SHINNIHON LINE who owned and controlled the S.S. YAMAWAKA MARU and the Defendants RUDOLPH knew or should have known of the nature of the lift to be made and failed to inform or instruct the Plaintiff where and how the necessary change in the rigging from a 2 Part to a 4 Part Block could be accomplished safely and without hazard to the Plaintiff; in failing to provide the R-5 with a guide line to guide the hoisting and lowering of the load from the deck of R-5 to the pier and vice versa; the Defendants RUDOLPH knew that the R-5 had worked only part of a day

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

prior to the 14th day of November 1970 and knew or should have known the purposes for which the R-5 and its appurtenances and rigging would be used on the following day have in mind the inclement weather which caused the cancellation of loading operations and failed to make provisions for the change of rigging at a time when the inclement weather and swells of the seas would not be present. The Chief Mate and Officers of the S.S. YAMAWAKA MARU knew of the stowage plan and failed to take steps to provide gear and tackle and supervision for safe loading.

The chief mate, officers and members of the crew of the YAMAWAKA MARU were on board said vessel, saw and were seen by the Plaintiff, each of whom was separated from each other by a short distance while the operation of lowering the 2 Part Block of the "R-5" as well as during the hoisting of the 4 part block from the deck of the "R-5" was taking place; the plaintiff as part of his evidentiary proof will rely on the facts that the vessel S.S. YAMAWAKA MARU, its Chief Mate, officers and members of the Crew were knowledgeable as to the size, type and nature of cargo that was to be loade aboard said vessel; that said Chief Mate, officers and crew members prepared a stowage plan or assisted in the preparation of a stowage plan for the cargo said vessel S.S. YAMAWAKA MARU was to take aboard; that cargo had been taken aboard the said vessel on the day or days before the occurrence and hence knew that the 2 part block was incapable of hoisting the 25 ton containers that came on to Pier 7 by tractor trailer trucks; that the Chief Mate officers and members of the crew of the S.S. YAMAWAKA MARU failed to take precautions to have the 2 part block changed to a 4 part block under conditions that would prevent the accident or warned the Plaintiff of the hazards inherent in changing the block under the circumstances that existed at the time of the accident; that the Defendant YAMASHITA SHINNIHON LINE, its Chief Mate, officers and crew failed to take reasonable precautions to make safe the changing of the 2 Part Block to the 4 Part Block; the Defendant YAMSHITA SHINNIHON LINE contracted or hired the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC., the Defendants M.J. RUDOLPH CO., INC. and M.J. RUDOLPH CORP. or some of them to

load the vessel S.S. YAMAWAKA MARU with the heavy 25 ton and heavier containers without inspecting, checking or otherwise informing persons who would be engaged in said loading operation of the need to have the block on the crane changed, particularly, inasmuch as the S.S. YAMAWAKA MARU and its officers, agents and employees were moored nearby and in full view of Pier 7 and the "R-5" and other floating vessels owned and operated by the defendants RUDOLPH; the Defendant YAMASHITA SHINNIHON LINE by its failure to act caused and permitted the "R-5" and S.S. YAMAWAKA MARU to be and become unseaworthy.

3 (a) Please refer to the evidentiary facts set forth in answer to Question No. 2; the Plaintiff from his view of the S.S. YAMAWAKA MARU observed persons aboard said vessel who by their actions of command to others aboard said vessel were believed to be the Chief Mate or other officer as well as crew men of said vessel;

(b) the negligence of each party in subdivision (a) contributed to the injuries of the Plaintiff as set forth in answer to question 2 above; said officers, crewmen and agents of the Defendant YAMASHITA SHINNIHON LINE, knowledgeable of the cargo to be loaded aboard its vessel, including its size and weight took no steps to warn the Plaintiff of the hazards; failed to instruct the stevedoring contractor hired and engaged by it, namely the Defendant INTERNATIONAL TERMINAL OPERATING CO.,INC. as well as the Defendants RUDOLPH to equip the "R-5" with proper and adequate hoisting gear, to hoist the 25 ton containers; that the "R-5" its crane, tackle, block and appurtenances along with the services of the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. became in fact an extension of the hoisting and loading apparatus of the S.S. YAMAWAKA MARU itself and by its inaction assisted in making the "R-5" and S.S. YAMAWAKA MARU unseaworthy; in failure of its duties to make the site of the loading a safe place to work.

4. See the answers to Questions 2 and 3 above.

5. Plaintiff sustained injury to this low back accompanied by a twisting and servere pain which was knife like in nature causing him to fall and collapse

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

with severe disability; Plaintiff was removed to Long Island College Hospital by ambulance with findings of pain in the lumbo-sacral area; plaintiff suffered considerable lumbo-sacral limitation of motion and paravertebral spasm with tenderness in the PSIS region; Plaintiff suffered a meralgia paresthetica which was present on the left side; Plaintiff was placed on Parafon Forte along with Dilatid for the severe pain he was suffering; Plaintiff continued to suffer severe lumbo-sacral discomfit which prevented him from riding in an automobile; in addition to the limitation of back movement, Plaintiff was restricted in the movement of his neck accompanied by pain; Plaintiff had discomfit and restriction of movement in both extremities particularly the outer side of his thighs; Plaintiff was required to utilize a lumbo-sacral support and to continue with physical therapy; Plaintiff suffered an irregularity of the C-5 vertebral body over its anterior-inferior surface with narrowing at the L-5, S-1 in the lower back and flattening of the lumbar curvature; Plaintiff was subjected to continuous diathermy in efforts to lessen the pain and discomfit in the lumbar sacrol region; Plaintiff suffers from restriction of the left arm and left side of the neck, numbness of the figers of the left hand and toes of the left foot which restriction continues up to the present time and are claimed to be permanent.

6. Long Island College Hospital $57.95; Westfield Orthopedic Group, Charted, 541 East Broad St., Westfield, New Jersey, $430.00; Overlook Hospital $692.00; Dr. Liss, $45; Dr. DeGulis, $25; Drugs, prescriptions and medicines $50 approximately and Back Support $26.00, payment for which support was advanced by the Defendants RUDOLPH who also advanced $25 toward the pharmacy bill.

7. (a) Plaintiff was confined to a hospital for a period of ten days; (b) confined to bed at various periods amounting to approximately 3 weeks; (c) confined to home approximately 4 weeks all periods aforesaid except for visits to doctors or the Westfield Orthopedic Group where he was treated as an out-patient; he was an in-patient at Overlook Hospital from January 25, 1971 to February 2, 1971; (d) Plaintiff was unable to work from November 14, 1970 to March 1, 1971 when he returned to light duty, working about the employer's yard.

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

8 (a) The Plaintiff claims loss of earnings due to the injuries suffered in the accident of November 14, 1970 either as a Crane Operator or Oiler at the rate of $72 per day or $360 for straight time, exclusive of overtime wages; (b) See answer to 8 (a) above, said wages being computed on the rates of straight time pay; that the Plaintiff further claims loss of earnings for overtime he would have worked, based on previous years of approximately $1,000, on double time for overtime or for Holidays, per Collective Bargaining Agreements of the Employer and Union.

9 (a) The Plaintiff returned to work for the same employer, the Defendant M. J. RUDOLPH commencing on March 1, 1971; (b) the Plaintiff has worked light duty upon his return to work on March 1, 1971 for a period of approximately one month; (c) the work performed during light duty was work that did not entail the operation of the Crane aboard vessels of the Defendants RUDOLPH or the use of heavy tools or the changing of heavy gear or equipment; (d) the weekly rate of base pay was $360 and the average weekly earnings in overtime was the sum of

$50 whenever a vessel which the floating cranes were loading or unloading were required to be in use in order for said vessel to continue on its scheduled mission and destination.

10 (a) Plaintiff filed federal tax returns for five years prior to the date of the accident November 14, 1969 and for each year subsequent thereto; (b) the tax returns mentioned above were sent to the Internal Revenue Service office either in Newark or Philadelphia, Penna. on the 15th day of April of each year and the amount reported for 1970 was $17,000 approximately with loss of earnings of 6 weeks in November and December 1970; $17,500 for 1971 approximately with loss of ten (10) weeks earnings in 1971; the amount of earnings for 1972 has not yet been filed.

11. None, except maintenance and cure at $8 per day or $56 per week for a period of 16 weeks.

12 (a) See answer to question 11; Maintenance and cure of $8 per day received weekly or bi-weekly; (b) weekly or bi-weekly (c) see anser to (b); (d) from the insurance carrier or from the Defendant M. J. RUDOLPH.

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

13 (a) Overlook Hospital located at Summit, New Jersey; Long Island College Hospital, Brooklyn, New York; (b) as an in-patient plaintiff was placed in traction for approximately 10 days and given exercise and heat therapy treatments; as an out-patient, plaintiff was given heat treatment and physical therapy treatment; (c) Admitted to Long Island College Hospital on the day of the accident November 14, 1969; admitted to Overlook Hospital on January 25, 1971 and discharged ten days later; (d) out patient treatment commenced on the day following the accident of November 14, 1969 and continues up to the present time; Plaintiff visited the Westfield Orthopedic Group/on June 1, 2, 5, 9, 1972; December 8, 13, 15, 1971. Plaintiff does not know/exact dates of each treatment as an out-patient or non-hospital patient except that he was treated by Dr. John Gudelis, Dr. Henry Liss, Dr. Jerome I. Cook and assistants of the Westfield Orthopedic Group,Chartered, and Dr. Laroe and Dr. G.N. Jelinek and Dr. Laval of Long Island College Hospital; Dr. R.P. Galallino, Radiologist at Overlook Hospital at intervals dated from November 14, 1969 to date.

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

14 (a) The Plaintiff was examined, attended or treated by Dr. John R. Gudelis, 2314 South Avenue, Scotch Plains, New Jersey 07090; Dr. Jerome I. Cook, Westfield Orthopedic Group, Chartered, 54 East Broad St., Westfield, N.J. 07000; Dr. Henry R. Liss, 10 Parrott Mill Road, Chatham, New Jersey; Dr. Laroe and Dr. G.N. Jelinek of Long Island College Hospital, 340 Henry St., Brooklyn, NY 11201; and Dr. R.P. Galallino, Radiologist of Overlook Hospital.

(b) Plaintiff unable to state full number of treatments or consultations except plaintiff states he was treated on the day of the accident at Long Island College Hospital by Dr. Laroe and Dr. Jelinek; thereafter Dr. John R. Gudelis commencing on the day following the accident and one subsequent day, namely 11/14/70 which was a house call and 11/16/70, an office call and by Dr. Jerome I. Cook commencing 11/17/70, 11/24/70 and Dr. Henry R. Liss on January 25, 1971.

(c) My lawyer at no time sent me to any doctor; all doctors were either selected by the Plaintiff or referred by his treating doctor.

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

15 (a) Since return to work, Plaintiff has not lost any time except that the Plaintiff continued to work while incapacitated with accompanying pain and inconvenience to support his wife and large family, knowing that the $8 received for maintenance and cure per day was wholly inadequate to maintain himself and family without the necessity of applying for public assistance.

(b) Plaintiff claims and maintains that his inability to do or complete full day's work is due to the injuries suffered in the accident of November 14, 1970 and that at times he is compelled to call on other co-employees or members of his Union group to help him perform his duties;

(c) Plaintiff received treatment on days he was incapacitated, following his return to work from heat treatment appliances he purchased;

(d) on days Plaintiff was incapacitated he was either treated by Dr. Cook or by his own wife or himself in the use of self-applied heat treatments;

(e) The nature of the ailment was severe and contractive pain in the lower back for which medication and heat treatment brought temporary relief.

16 (a) Plaintiff sustained no accident following the occurrence of November 14, 1970 except for minor bruises or lacerations common to those working in the trade and for which home remedies were applied and no claim is made. Plaintiff does not claim the occurrence of any other accident. (b), (c), (d), (e), (g). See a above.

17. None, except common colds and not referred to a physician for examination or treatment.

18. None since the date of the occurrence of November 14, 1970.

19 (a) No.

20. Appendectomy when Plaintiff was 12 years of age; sinus condition about the age of 10 years in Baby's Hospital, Newark, N.J; about five years ago pulled muscle on stomach when Plaintiff slipped on ladder while working for employer RUDOLPH, no hospitalization except treatment by doctor; plaintiff does not know the name

of any doctors who treated him for the above, which happened prior to the present accident of November 14, 1970; Doctors who treated or examined Plaintiff and Hospital where he was confined following present occurrence of November 14, 1970 are listed above.

21. Yes, when cut on nose and glass in eye when a seaman threw beer bottle on deck of vessel of Black Diamond Line; no claim was made except that ship's insurance carrier made an offer of $600 to be used for payment of medical bills and for pain and suffering; this incident occurred about seven years ago.

22. (a) None, except the present one.

23. (a) (b) Answers declined on the ground that the same are the work products of my attorneys and also on the ground that the same is privileged between my attorneys and myself.

24. Joe Chuck and "Joe the Harbor Master" employees of the Defendant INTERNATIONAL TERMINAL OPERATING CO., INC. witnessed or have knowledge with respect to the matters alleged in the complaint; also Mr. James Rudolph and other officers or employees of these firms of M.J.

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT, YAMASHITA

RUDOLPH CO., INC. and M. J. RUDOLPH CORP. have knowledge of the matters alleged in the complaint; the Chief Mate and Officers and crewmembers of the S.S. YAMASHITA MARU whose names are unknown to the Plaintiff; Dr. John R. Gudelis and other doctors, addresses unknown, who examined and treated the Plaintiff.

25 (a) Plaintiff has not obtained written or oral statements in regard to matters of the complaint except that immediately prior to the accident "Joe Chuck" shouted and screamed and abused the Plaintiff with obscene language claiming that he had done no work the day previous in preparing the rigging of the "R-5" to lift the 25 ton containers and that "you are not ready now" and similar empthets hurled at the Plaintiff, despite the fact that the Plaintiff was working on a different floating rig of the Defendants RUDOLPH the day before and not in the vicinity of Pier 7 or the Japanese Vessel S.S. YAMASHITA MARU or the "R-5". Any statement written or oral obtained by my Attorneys are

their work product and upon information and belief are not subject to disclosure and are privileged.

(b) Declined for the reason set forth above.

Dated: New York, N. Y.
January 19, 1973

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, N.Y. 10007
Tel: 227-2262

BY William J. Corcoran
WILLIAM J. CORCORAN
A Member of the Firm

TO:

KIRLIN, CAMPBELL & KEATING, ESQS.
Attorneys for Defendant YAMASHITA SHINNIHON LINE
120 Broadway
New York, New York 10005

FOGARTY, NIELSEN, McLAUGHLIN & SEMEL, ESQS.
Attorneys for Defendant INTERNATIONAL TERMINAL
OPERATING CO., INC.
10 Rockefeller Plaza
New York, N. Y. 10020

D'AMATO, COSTELLO & SHEA, ESQS.
Attorneys for Defendants
M. J. RUDOLPH CO., INC. and
M. J. RUDOLPH CORP.
116 John St.
New York, N.Y.10038

PLAINTIFF'S INTERROGATORIES PROPOSED TO THE DEFENDANT, YAMASHITA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

MICHAEL McSWEENEY :

Plaintiff, :

-against- : 72 CIV. 1482

M. J. RUDOLPH CO., INC. :
M. J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE and :
INTERNATIONAL TERMINAL OPERATING
CO., INC. :

Defendants. :

- x

INTERROGATORIES
PROPOSEDED TO THE
DEFENDANT YAMASHITA
SHINNIHON LINE

PLEASE TAKE NOTICE, that the Defendant YAMASHITA SHINNIHON LINE is hereby required to answer the following enumerated interrogatories under oath pursuant to the provisions of Rule 33 of the Rules of Civil Procedure for the District Court of the United States as amended.

1 INTERROGATORIES propounded to the Defendant YAMASHITA SHINNIHON LINE to be answered by its President or other officer or person with knowledge in writing and under oath. The Plaintiff demands that if the Defendant YAMASHITA SHINNIHON LINE and/or its Attorneys acquire any further information relevant to these Interrogatories embodying said information be forwarded immediately to the Attorneys for the Plaintiff MICHAEL McSWEENEY.

PLAINTIFF'S INTERROGATORIES PROPOSED TO THE DEFENDANT, YAMASHITA

1. In connection with the loading of container cargo, when did the vessel, YAMAWAKA MARU arrive on Pier 6, Brooklyn, New York and when did said vessel leave.

2. State name and address of the person in possession of the loadingplan of the SS YAMAWAKA MARU.

3. State the tonnage of the cargo container that was to be taken on board the YAMAWAKA MARUE on November 14, 1970 as reflected from the vessel's cargo stowage plan.

4. State the number of licensed personnel aboard the SS YAMAWAKA MARU during the loading operation and, particularly, on November 14, 1970.

5. State substance of the loading arrangement between defendant YAMASHITA SHINNIHON LINE and ITO through "Joe Chuck" boarding supervisor of ITO, or any other representative of ITO or the defendant RUDOLPH.

BEST COPY AVAILABLE

PLAINTIFF'S INTERROGATORIES PROPOSED TO THE DEFENDANT, YAMASHITA

6. State name and ratings of the officers aboard the SS YAMAWAKA MARU during the said vessels loading operations.

Dated: New York, N.Y.
October 29, 1973

Yours, etc.

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, New York 10007

BY ______________________
WILLIAM J. CORCORAN
An Associate of the Firm

TO:

KIRLIN, CAMPBELL & KEATING, ESQS.
Attorneys for Defendant YAMASHITA SHINNIHON LINE
120 Broadway
New York, New York 10005

D'AMATO, COSTELLO & SHEA, ESQS.
Attorneys for Defendants RUDOLPH
116 John Street, New York, N.Y. 10038

FOGARTY, NIELSON, McLAUGHLIN & SEMEL, ESQS.
Attorneys for Defendants INTERNATIONAL TERMINAL OPERATORS CO.
10 Rockefeller Plaza, New York, N.Y. 10020

DEFENDANT YAMASHITA'S ANSWERS TO PLAINTIFF'S INTERROGATORIES.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

WILLIAM McSWEENEY, :

Plaintiff,

-against-

ANSWERS TO
INTERROGATORIES

:

M.J. RUDOLPH CO., INC.
M.J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE
& INTERNATIONAL TERMINAL
OPERATING CO., INC.,

72 Civil 1782

:

Defendants.

--x

Defendant Yamashita Shinnihon Line, answering the six interrogatories propounded by the plaintiff who has withdrawn his prior interrogatories, without admitting its liability or that an accident occurred as alleged by plaintiff, by its attorneys, Kirlin, Campbell & Keating, alleges upon information and belief as follows:

1. Arrived 1310 hours on November 11, 1970; sailed New York on November 14, 1970 at 2242 hours.

2. Kirlin, Campbell & Keating, 120 Broadway, N.Y., N.Y. has the Stowage Plan.

3. The number of the container is needed to get the weight.

DEFENDANT YAMASHITA'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

4 & 6. We are writing to Japan for crew list.

5. There is no written record of any such arrangement. This would be decided at the time of loading by the stevedore I.T.O.

Dated: New York, New York
November 1 , 1973.

Yours, etc.

KIRLIN, CAMPBELL & KEATING

BY: JAMES R. CAMPBELL
A Member of the Firm
Attorneys for Defendant
Yamashita Shinnihon Line
Office & P.O. Address
120 Broadway
New York, New York 10005

TO: CORCORAN & BRADY, ESQS.
Attorneys for Plaintiff
11 Park Place
New York, New York 10007

D'AMATO, COSTELLO & SHEA, ESQS.
Attorneys for Defendants M.J.
Rudolph Co., Inc. and M.J. Rudolph Corp.
116 John Street
New York, New York 10038

FOGARTY, NIELSEN, McLAUGHLIN & SEMEL, ESQS.
Attorneys for Defendant International Terminal
Operating Co., Inc.
10 Rockefeller Plaza
New York, New York 10020

DEFENDANT YAMASHITA'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES R. CAMPBELL, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Kirlin, Campbell & Keating, attorneys for the defendant Yamashita Shinnihon Line herein and I have read the foregoing answers to interrogatories and know the contents thereof; the same is true upon information and belief.

The grounds of deponent's belief are records, reports and documents contained in the files of the defendant Yamashita Shinnihon Line.

The reason this verification is made by deponent and not by the defendant Yamashita Shinnihon Line is because the defendant Yamashita Shinnihon Line is a foreign corporation.

JAMES R. CAMPBELL

Sworn to before me this

1 day of November, 1973

Notary Public

VINCENT J. LYNCH
Notary Public, State of New York
No. 24-7636200
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1974

mp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------x

MICHAEL MC SWEENEY,

Plaintiff,

vs. — 72 CIV 1782

M. J. RUDOLPH CO., INC.,
M. J. RUDOLPH CORP., YAMASHITA
SHINNIHON LINE,
INTERNATIONAL TERMINAL OPERATING
CO., INC.,

Defendants.

-------------------------------------x

Before: HON. RICHARD OWEN, D.J.,
and a Jury.

New York, March 18, 1976.

APPEARANCES:

CORCORAN & BRADY, ESQS.,
Attorneys for Plaintiff;
By: William J. Corcoran, Esq., of Counsel.

D'AMATO, COSTELLO & SHEA, ESQS.,
Attorneys for Defendant Rudolph;
By: Richard C. Browne, Esq., of Counsel.

KIRLIN, CAMPBELL & KEATING, ESQS.,
Attorneys for Defendant Yamashita;
By: James Campbell, Esq., of Counsel.

FOGARTY, MC LAUGHLIN & SEMEL, ESQS.,
Attorneys for Defendant Ito;
By: James D. Hockett, Esq., of Counsel.

- - -

(In the robing room.)

THE COURT: In this case, which is 72 Civil 1782, the cross-claims as between defendants will be withdrawn from the jury and will be decided by me, should the need arise, and defense counsel who are here have stipulated that is so.

MR. HOCKETT: Yes, your Honor.

MR. CAMPBELL: Yes, your Honor.

MR. BROWNE: So stipulated, your Honor.

THE COURT: Now, I am granting, because of the claims over, I am going to give each of them one extra challenge in addition to those provided by the rules, and in the order of the caption each of you shall exercise your individual one at the same time with the collective exercise of the one assigned to you by the rules.

MR. CORCORAN: May I say respectfully that I do not agree with the Court allowing extra challenges on the ground of the cross-complaint for the reason it is not going to be presented to the jury, and hence --

THE COURT: I know, but they have got to litigate the facts up there, and they may have jurors who view the facts differently in this case.

MR. CORCORAN: Your Honor, as I see it, if the question of the cross-complaints are going to be removed from the jury, they shouldn't have the extra challenge which you are giving them on the alleged cross-complaint because technically the jury is not going to consider the cross-complaint. So there will be no reason to justify any extra challenge.

MR. CAMPBELL: Our interests are not the same in this case. They are diverse. I am trying to make not the shipowner Shinnihon liable, but if anyone, one of the other two defendants.

MR. CORCORAN: But withdrawing the issues from the jury on the question of the cross-complaints and leaving the determination to the trial court in my opinion takes the issues out of the jury so there is no reason in fact or in law for granting them an additional challenge.

THE COURT: Well, you make a good point. I nevertheless think their interests are not necessarily the same, and it is discretionary with the Court to grant extra challenges under Section 1870 of Title 28, and I am going to do it.

MR. CORCORAN: I take exception, your Honor.

THE COURT: Very good.

MR. CORCORAN: Title 28, 1870?

THE COURT: Yes. Now, is there anything else? My list of questions of you is exhausted.

MR. CORCORAN: Off the record, your Honor.

THE COURT: Off the record.

(Discussion off the record.)

THE CLERK: For trial, Michael McSweeney v. M.J. Rudolph Co., Inc., and others.

Are all sides ready?

MR. CORCORAN: The plaintiff is ready, your Honor.

MR. BROWNE: Defendant Rudolph is ready.

MR. CAMPBELL: Defendant Yamashita is ready.

MR. HOCKETT: Defendant International Terminal Operating Co., Inc. is ready.

(A jury was duly impaneled and sworn.)

(Two alternate jurors were sworn.)

THE COURT: All right, Mr. Corcoran.

MR. CORCORAN: May it please your Honor, Madam Foreman and Ladies and Gentlemen of the Jury, it is customary at this time, ladies and gentlemen, for the attorney to give you a brief outline of what we hope to prove. As his Honor has instructed you, what I say is not evidence. It is not proof. It is morelike what his Honor said, a road map. So you people will be able to follow the evidence to its destination.

Briefly, the case pertains to Mr. Michael McSweeney, who is a resident of Fanwood, New Jersey, and has been employed as a crane operator aboard a floating vessel of a fleet owned by one of the defendants, namely, the M.J. Rudolph Company, Incorporated.

You would have a point of vantage in some of the buildings in Manhattan to be able to see these vessels plying back and forth in Port Newark and in Port New York. They are used primarily to load or unload the vessels that come into these ports. The particular vessel upon which Mr. McSweeney was working is operated by M.J. Rudolph Corporation as distinguished from the other corporation known as M.J. Rudolph Company, Incorporated.

So that between them the two Rudolph Corporations own the vessel, and one of them is the employer of Mr. McSweeney.

This accident occurred on November 14, 1970, and it occurred at Pier 6 in Brooklyn. Pier 6 is one of the number of piers owned by the Port of New York and New Jersey Authority and in this particular case Pier 6 was leased to one of the defendants, namely, International Terminal, which is more familiarly known as ITO.

On the day prior to this occurrence Mr. McSweeney had been employed on another vessel of the Rudolph Company, and that was known as the R-6. The vessel on which he was injured, or working on the date of his accident, is the No. R-5.

Now, there was a Japanese vessel in port at Pier 6 known as the Yamawaka Maru. I think the word "Maru" is on most Japanese vessels. But, in any event, that is the name of the vessel. And it is owned by the Yamashita Shinnihon Company, Limited, and that company is named as one of the defendants in this action.

The remaining defendant is the ITO, along with the Rudolph Company and the Japanese vessel-owner. As I say, on the day prior to this occurrence Mr. McSweeney had been employed on the R-6. Somewhere on 21st Street in Brooklyn, New York, and some distance from Pier 6 where the R-5 was.

On the evening of November 13, the day prior to this occurrence, Mr. Rudolph gave orders to Mr. McSweeney to report the following morning to the R-6, or, the R-5, I am sorry. Now, what had happened the day prior was not knowledgeable to Mr. McSweeney. He did not know what was done on this prior day.

He reported some time around 7.30 in the morning and went aboard the vessel R-5, checked out the equipment, grease, oil, whatever he had to do, and shortly thereafter he observed a trailer-truck coming into the pier. This trailer-truck had the legend on it of ITO which indicated perhaps that it was owned by this defendant.

He also observed that there were four men standing, later on they stood on top of this trailer-truck which had a large container on it.

Now, the container is the new method of cargo shipping, and of course is much more satisfactory than prior manner or methods of shipping. These containers are somewhat large, some are 20, some are 40 feet in length, 8 feet high, and about 8 feet wide, and they weigh when stuffed -- incidentally, that's a term along the waterfront to show that the container is filled or loaded, they call it a stuffed container. And they weigh anywhere from 5 to 10 to 20 and 35 and 40 tons.

Now, these containers, they look like a big trailer-truck itself and they have tags on them and Mr. McSweeney went over to look at the tag and it had the name of this vessel to which it was being consigned, and it also had the weight on the tag. The weight on the tag was 50,000 pounds. 25 tons. When he discovered that he shouted up to the engineer, who incidentally is about 40 feet above the deck in the cab of this crane, and told him that it was impossible to lift these large containers with the block that was suspended from the boom of this crane.

Now, this crane is somewhat similar to the type of cranes you see on land. It's built on the chassis which is round, or circular, and the entire cab and housing revolves completely in a 360-degree circle.

There is a boom on it which is suspended from a portion, or the A-frame of this crane, and this boom can be raised and lowered. The boom can be held fixed while the operator raises or lowers the load which is suspended from the boom. And this crane is permanently affixed to the vessel.

The vessel as such in navigable water constituted this crew of the engineer and the oiler, which is Mr. McSweeney. Of course in this case the crane was a Diesel crane, but whenever the crane is oil-fired or coal-fired the oiler becomes the fireman.

Now, Mr. McSweeney told the representative of the ITO -- now, the ITO leases this pier from the Port Authority, and they have a man called a pier superintendent. His name was Mr. Maguilo. But more familiarly known, and not offensively, as Mr. Joe Chuck.

Mr. Chuck, upon being informed that the crane was unable to lift a 25-ton load, began to curse and harass and threaten Mr. McSweeney. He said, "You fellows were here the day before, you hung around the vessel, you didn't do anything, and now I got a crew of men waiting and you don't have this block changed to what we call a four-part block.

The vessel at the time was rigged with a two-part block which was limited to something like 36,000 pounds, or 18 tons. And we will enveavor to show you what a block looks like, and as His Honor pointed out, it is nothing else but a pulley. It is a steel fabricated pulley which has wheels in it, and which are known as sheaves, and around this the cable revolves, and so on.

So when it has a two-part block, you will see two cables, a four-part block has two sheaves in it with four cables. So the lifting capacity is much greater.

Now, Mr. McSweeney had asked for help. In fact, he will testify that another employee of the ITO who is known colloquially as Joe, the Harbor Master, he had asked him to help him, and he promised he would, and we are going to show that that help was not forthcoming.

Now, the engineer on the R-5 lowered his load, suspended from the boom, which was the two-part block, and as he did that Mr. McSweeney hooked it onto a four-part block that was laying on the deck, the forward deck of the R-5.

This four-part block is estimated to weigh a thousand pounds. And they picked it up and they made a swing over to the area of the dock, or pier, which would be clear of any containers or other freight, cargo, and the engineer lowered his boom to a point and they lowered the load which was the four-part block.

As he did so when it came to an elevation of about 5 feet Mr. McSweeney put his hands on it in order to guide it as it was going to be lowered to the bulkhead deck. And it had to be positioned in such a way that they would be able to reave this four-part block with the cable. Because if it came to rest in an improper position they couldn't lift it up. A thousand pounds.

It was while he was holding on the hook of this four-part block seeking to position it as it was going to be lowered, the block twisted and lurched with the cables and that caused a twisting action on Mr. McSweeney and he let go and fell to the floor of the pier. He remained there immobile. He could not rise. He was unable to get up. A group of men came around and they helped him.

They called for an ambulance from the Long Island College Hospital. And some time thereafter he was put aboard a pallet, and with a hi-lo was lifted up into the ambulance and taken to the emergency room in Long Island College Hospital. He was given emergency treatment there and Mr. Rudolph, Mr. James Rudolph, thereafter took Mr. McSweeney home in his own car. That is the son of the former owner of the Rudolph Company. And took him home.

When Mr. McSweeney came home he was unable to get in bed. His back was so painful that he had to remain lying on the floor. His wife called for a doctor. The doctor came and gave him some muscle relaxer and other medication, but was unable to do anything beyond that. The doctor saw him again and attempted the same type of treatment, and ultimately referred him to the Westfield Orthopedic Group in Westfield, New Jersey, not too far from where Mr. McSweeney resides.

He came under the care of a Dr. Jerome I. Cook, who is an orthopedic surgeon in New Jersey.

Dr. Cook treated him on a number of visits to his office and made a diagnosis as to what he believed the injury was. It was a muscle sprain in the lumbosacral area, and the ultimate diagnosis at a later time after Mr. McSweeney was referred to the Overlook Hospital.

Mr. McSweeney was confined to this hospital at Summit, New Jersey, for a period of 10 days, during which time he was in traction. The traction being, I understand, a surgical attempt to relieve the pressure in the area of which he was complaining.

Mr. McSweeney as the result of this occurrence was out of work for 16 or more weeks. He lost his wages for that period of time, which is claimed to be $7,000 to $7,500, and of course he became obligated to pay for the medical and surgical treatment, as well as for the hospital that was rendered to him.

Now, it is the claim of the plaintiff that the defendants and each of them was negligent in their duties to Mr. McSweeney. It is the contention of the plaintiff that the R-5, the vessel in navigable waters, and as such has a crew of two, that the vessel owed him what may be described as the doctrine of seaworthiness. Of necessity I will not speak to you on any points of law. That is the exclusive realm of his Honor, Judge Owen, and I am sure that he will instruct you people referable to what is known as a seaworthy vessel.

It is ourcontention that the failure of the defendant Rudolph and the defendant ITO to furnish help for Mr. McSweeney was such an act that made the vessel unseaworthy.

We are also claiming that there was no equipment available that would permit Mr. McSweeney to use, say, a tag line on this load as it was being hoisted or lowered so that he could guide it in the operation of the changeover from a two to a four-part block.

It is our claim that the defendant ITO by the callous harassment of its pier superintendent who claimed that the plaintiff had done nothing the day before and was now delaying four men, particularly these four men that were standing on top of the container, and ready to hook on to the boom of the crane, as well as a gang of longshoremen that would have participated in the loading operations aboard this Japanese vessel.

During the course of the testimony I must with great reluctance inform you that there will be some foul language described, but, this is the language which we contend establishes the harassment and the coercion that the pier superintendent of ITO exerted upon Mr. McSweeney in the belief that Mr. McSweeney had been aboard this R-5 the day before, which he was not.

All of these factors which we hope to prove will in our humble opinion establish that the defendants were derelict in their duty, in their duty to Mr. McSweeney who takes on the cloak of a seaman, and that is what he was despite the fact that it involves a crane, he is engaged in the mission of the Japanese vessel insofar as assisting in its loading operation.

The Japanese vessel, I understand, had booms which were limited to a 3-ton capacity, and of course they had to use these floating cranes to load with these large 25 and 40-ton containers.

I think I have outlined what we believe to be our case, and with that I will respectfully sit down.

Thank you, your Honor.

MR. BROWNE: If your Honor please, Madam Forelady, Ladies and Gentlemen, I represent Rudolph. It would probably be simpler if we just call it Rudolph, and not worry about one company or the other. Substantially the same.

Rudolph's funcetion is to provide cranes in New York Harbor to vessels. It is our contention in this case that Mr. McSweeney sprained his back, and we don't know how it happened or why it happened. It could have happened any way.

You are here to find out if something was done wrong. As far as the complement of the crew is concerned, the help that we provide, Rudolph sends cranes out, and the complement of the cranes, two. We will bring Mr. Rudolph in to tell you that it's always been that way. There has never been any problem with having two men on a crane. In fact, it is pursuant to a union agreement that there be two men on a crane. Other than this, it's really not my problem.

I am not here to discuss with you whether Joe Chuck abused Mr. McSweeney or not. Joe Chuck says he didn't. Mr. McSweeney says he did. That is a problem for you, and it is a problem for Mr. Hockett to defend. I am not here at this moment to convince you of anything or to argue with you or to sum up to you. I am just here to tell you our position.

At the end of the trial I will be permitted to speak to you again, and then to discuss the evidence. At this point you have no evidence, so there is no way you could reach any conclusions about anything. Therefore, I will speak to you again at the end of the trial.

Thank you.

MR. CAMPBELL: Your Honor, Madam Forelady, Ladies and Gentlemen of the Jury. I am the attorney for the defendant Yamashita Shinnihon Line. That is the Japanese ship that was mentioned by Mr. Corcoran before. The ship that was going to be unloaded, or loaded, whichever.

The accident didn't happen on the Japanese ship, the Yamawaka Maru. It had to do with another ship, or crane, the R-5. So we have at least three defendants here. And you have to differentiate between these defendants, because the word "wrong" has been thrown out, and the word "duty."

The Japanese shipowner has a large freighter coming in to be loaded. It has two independent contractors, experts in their fields. A stevedore, International Terminal Operating Company, well-known throughout the Port of New York, and M.J. Rudolph Corporation a crane operator, another independent contractor, another expert in stevedoring work.

Now, the ship is in the harbor. This accident occurred a couple of hundred feet at least from the ship. We don't know how many men the plaintiff asked to help him. We have nothing to do with that. This is something for the independent contractor, M.J. Rudolph, between its employee and itself.

Now, what Mr. Corcoran has said, and he has gone through a tremendous amount of telling what the case is about, what he says of course is not evidence. What I say is not evidence. What Mr.Browne and Mr. Hockett say is not evidence.

The evidence will come from the witness stand. I ask you to listen to the witnesses, to ask yourselves what they say, is that credible, is it believable, is that what happened?

Then I ask you to ask yourselves one more question: how was Yamashita Shinnihon liable to this plaintiff? What did we do wrong?

At the end of the case when we come back with summations I am going to ask you to find for my client, Yamashita Shinnihon Line, in favor of my client, because as of now I can say you have yet to see what we did wrong in this case.

Thank you.

MR. HOCKETT: If it please the Court, fellow counsel, Madam Forelady, Ladies and Gentlemen of the Jury.

What my colleagues have said pretty much sums up the feelings of the respective parties that you have heard to this point of time.

We represent ITO. As has been explained to you by several of the other attorneys, they are stevedores. Their jobs are to put cargo and stow cargo aboard ships, or, conversely, to unload cargo aboard ships. They are separate and distinct from M.J. Rudolph. They have nothing to do with the M.J. Rudolph functions at Pier 6 or anywhere else in the Port of New York.

M.J. Rudolph's role in the operation, the cargo operation, is to load very heavy lifts of cargo aboard vessels where the ship's equipment is inadequte to do so itself. The shipboard winches and cranes. Therefore, the necessity to bring in a floating crane to load the heavier cargo.

The operation of the crane as well as the maintenance of that crane, and that would include fixing or altering the crane in such a way as to be able to accommodate heavy lifts, is entirely the responsibility of M.J. Rudolph, and its employees, and ITO and its employees have absolutely nothing to do with this function.

Now, as several others have said thus far, what we say is not evidence, but let me just say this, and we will come in with proof, that ITO is a different trade essentially, that neither the employees nor the supervisory personnel of ITO would be authorized to, or it would be in fact beyond their scope of employment to get any help to this individual as one of the other attorneys has suggested.

Plaintiff makes a claim that the number of personnel was inadequate to change the blocks from a lighter block to a heavier block to accommodate the loads. Pointing the finger at ITO as being responsible for the inadequate personnel in order to accomplish this.

Again, bear in mind that ITO and M.J.R. are separate organizations with separate and distinct foundations. We are not in business to change blocks.

MICHAEL LAWRENCE McSWEENEY,

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. McSweeney, are you the plaintiff in this action?

A Yes, I am, sir.

Q Will you tell us, please, where you reside?

A 121 Patterson Road, Fanwood, New Jersey.

Q How long have you resided there?

A Approximately 14 years.

Q Are you married?

A Yes, I am.

Q Do you have any children?

A Yes, I have three children.

Q Do you remember the 14th day of November, 1970?

A Yes, I do.

Q Did you meet with an accident on that date?

A Yes, I did.

Q About what time of the day did this accident occur?

A Shortly after 8 o'clock. Between 8 and 8.30.

Q Will you tell us, please, by whom you were employed at that time?

A M.J. Rudolph Company, Corp., whatever.

Q For how long a period of time prior to this occurrence had you been employed by the M.J. Rudolph Corporation?

A Eight years.

Q Will you tell us, please, in what capacity?

A As an operating engineer.

Q And as an operating engineer will you tell us, please, what your duties are?

A Well, my duties at the time were to oil, grease, fuel the crane, handle lines, put out lights if we were towing at night, to watch we didn't hit, you know, the vessel when we were going alongside, do damage to the vessel or the crane.

Q On what vessel did this accident occur, or, in connection with what vessel? Did it have a name or number?

A R-5.

Q The Rudolph Company, that is the other one, M.J. Rudolph Company, Inc., do they own a fleet of these cranes?

A Yes, they do.

there on that vessel?

A That's a three-drum hoist.

Q When you talk of drums, is that a circular piece of metal around which the cables would run?

A That's correct.

Q And by means of levers the operator or engineer is able to raise and lower the boom?

A That's correct.

Q And he can swing the crane around 365 degrees?

A That's correct.

Q Can the operator hold the boom in a fixed position and lower or raise the load by the cable?

A Yes. Of course.

Q Incidentally, are you a crane operator?

A Yes, I am now.

Q I show you a photograph and ask you what it represents (handing).

MR. CORCORAN: I would like this marked for identification.

xx (Plaintiff's Exhibit 1 marked for identification.)

A Yes, this is the floating crane, R-5.

Q Does that photograph fairly represent the R-5 as of the time of November 14, 1970?

A Yes.

MR. CORCORAN: At this time, your Honor, I will offer it in evidence.

MR. BROWNE: No objection.

MR. CAMPBELL: No objection, your Honor.

MR. HOCKETT: No objection.

THE COURT: It may be received in evidence.

(Plaintiff's Exhibit 1 received in evidence.)

BY MR. CORCORAN:

Q Mr. McSweeney, I show you another photograph and I ask you, please, to tell us what it represents (handing)?

A This represents four of Rudolph's cranes working, discharging a ship. The cranes of R-1, crane 4, crane 5 and crane 6.

Q Does this picture fairly represent crane No. 5 as the November 10, 19 --

A Yes.

Q November 14, rather?

A Yes. The crane hasn't been changed since that time.

MR. CORCORAN: May we mark that for identification.

(Plaintiff's Exhibit 2 marked for identification.)

MR. CORCORAN: I now offer it in evidence, your Honor.

MR. BROWNE: No objection.

MR. CAMPBELL: No objection.

MR. HOCKETT: No objection.

THE COURT: It may be received in evidence.

(Plaintiff's Exhibit 2 received in evidence.)

BY MR. CORCORAN:

Q At this time, Mr. McSweeney, I show you another photograph and ask you, please, what it represents (handing)?

A This is a picture of the R-6, which is basically identical to the R-5 in all ways, except it's two years newer. Loading cargo aboard the ship.

Q Was the R-6 the vessel you were on on the day before the accident?

A Yes, that's correct.

MR. CORCORAN: Would you mark this Plaintiff's Exhibit 3 for identification, please.

xx (Plaintiff's Exhibit 3 marked for identification.)

MR. CORCORAN: At this time I respectfully offer it in evidence.

MR. BROWNE: I would like to know the -- I will object to it unless there is some show of relevancy.

THE COURT: What is the purpose of this offer?

MR. CORCORAN: The purpose is to show the jury and your Honor the fact that the crane is actually in the course of loading the vessel so they would have a better picture of how the crane operates. This particular picture is adjacent to a vessel, whereas the others were not in that category. It's merely to clarify it.

MR. CAMPBELL: I think the testimony in this case is that the crane was not near the vessel and, therefore, it is certainly irrelevant.

MR. CORCORAN: We don't say --

THE COURT: Let me have it, please.

MR. CORCORAN: We don't say that the vessel in that picture, your Honor, is the Yamashita, or the Yamawaka Maru.

THE COURT: At this point I will reserve decision on this.

BY MR. CORCORAN:

Q Again I show you a photograph, Mr. McSweeney, and ask you what that represents (handing)?

A This represents the Rudolph crane, and --

THE COURT: Is this 5?

THE WITNESS: That's the R-6, as I look at it carefully, loading the ship with cargo.

THE COURT: Mark it Exhibit 4 for identification, and I will put it together with Exhibit 3 and reserve decision on it.

(Plaintiff's Exhibit 4 marked for identification.)

MR. CORCORAN: I make the formal offer of it.

THE COURT: I assumed you had, and I assume they will make the same objection on the ground it is not relevant.

MR. CORCORAN: I offer No. 4 in evidence, and for the record the purpose is merely to show the Court and jury how these Rudolph floating cranes load and unload a vessel, and it is only for that purpose, your Honor, just to enable the jury and your Honor to have a clearer picture of the events that the witness will testify to.

THE COURT: Let's see. I will reserve decision.

MR. CORCORAN: And that's the only purpose.

THE COURT: All right.

MR. CORCORAN: May I at this time, your Honor, so that the jury may be able to follow the testimony, permit the jury to see these exhibits?

THE COURT: You may.

MR. CORCORAN: Shall I proceed or wait?

THE COURT: I'll tell you, I think on the representation that this is only representative of the type of work that the crane gets involved in, and that it has otherwise no relationship to this case at all except that, and the witness having testified that the R-6 is the same as the R-5, only it is two years younger, I will admit Exhibits 3 and 4 for that limited purpose, and for no other purpose.

MR. CORCORAN: Thank you, your Honor.

(Plaintiff's Exhibits 3 and 4 received in evidence.)

MR. CORCORAN: Does your Honor wish me to wait until the jury has seen the exhibits?

THE COURT: I don't think so. Go ahead.

BY MR. CORCORAN:

Q Mr. McSweeney, will you tell us, please, where you were working on the day prior to this accident, namely, on November 13, 1970?

A Yes. I was working aboard the crane R-6. I was the engineer on the R-6 at 21st Street in Brooklyn.

Q Was the R-6 on November 13, 1970, removed in distance from where the R-5 was at Pier 6?

A Several miles away.

Q Several miles?

A Several miles.

Q Did you on the afternoon or evening of November 13, 1970, receive any instructions from Mr. Rudolph?

A Yes. I received instructions from Mr. Rudolph to report aboard the R-5 the following morning.

Q When you say Mr. Rudolph, what is his first name?

A Arthur Rudolph, Sr.

Q What was his title in this company?

A He was the president of the company.

Q In accordance with those instructions, did you thereafter on the following morning report to the R-5?

A Yes, I did.

Q Tell us,please, where the R-5 was stationed, or located.

A It was at Pier 6, Brooklyn, Port Authority.

Q Was the R-5 moored or tied up anywhere?

A Yes. It was moored to the bulkhead on the south side of Pier 6.

Q Tell us, please, when you arrived on the morning of November 14th -- by the way, what time did you arrive?

A Approximately 7.30.

Q Will you tell us, please, what the condition of the weather was?

A A regular sort of a day. You know, it wasn't raining. I can remember that. I believe it was a clear day.

Q What about wind?

A It was calm.

Q When you arrived at around 7.30 in the morning of November 14, where did you go?

A I went aboard the crane, the R-5.

Q What did you do when you went aboard?

A Well, I changed my clothes and I greased up, did my oiling, and I started the engines, warmed them up, and then proceeded to build the air up so that the crane woul be ready to go to work at 8 o'clock.

Q Tell us, please, who the engineer on the crane R-5 was that morning.

A It was a Pete Munsinger.

Q Where does he sit or stand in operating the crane R-5?

A He's in the operating cab.

Q How high is that above the deck?

A It's about 40 feet.

Q How did he reach that cab?

A He climbs a ladder.

Q After you were there and say around eight o'clock, did you observe any cargo on Pier 6?

A Yes. They started to back in trailers next to the crane to be hoisted aboard the deck of the crane.

Q This Pier 6, does it have what is known in your language as a farm area?

A Yes.

Q What is the farm area?

A A farm area is where they usually store equipment or materials to be loaded aboard the vessel, or shipped.

Q You mentioned that there was a trailer truck being backed into the pier?

A That's right.

Q Did you notice the name if any on this trailer truck?

A Yes, it was an ITO truck, because it had the ITO emblem on it and initials.

Q What was on this trailer truck?

A It was a 40-foot box, a van, container.

Q Is this known as a container?

A That's right.

Q Tell us, please, the height of this box or van?

A About eight feet.

Q And the width?

A About eight feet.

Q Did you go to this trailer and look at this container?

A Yes, I did.

Q What did you observe?

A I observed the destination of the container.

Q Which was what?

A It had the name of the ship on it. I don't know, the Yamashita Maru or --

Q The Yamawaka?

A Yamawaka, something like that. And the weight of the container.

Q What was the weight?

A The weight of the container was 50,000 pounds.

Q Did you notice the type of equipment that was on the boom of the R-5 when you came there on the morning of November 14th?

A Yes. It had a two-part block.

Q Tell us in as simple away as you can what is known as a two-part block?

A Well, basically it's a sheave with two steel sheet plates on each side that the cable rides on.

Q Is that similar to a wheel or pulley?

A That's exactly what it is, a wheel or a pulley.

Q And when it's two parts does that mean that the cable goes around it in two separate parts?

A Yes, that's correct.

Q And that has a certain lifting capacity, has it?

A That's right.

Q What did the two-part block on the R-5 --

THE COURT: Wait just a minute. The two-part block means there is one piece of cable going in and it comes out the other side?

THE WITNESS: And one piece coming outside.

THE COURT: So there is only one wheel?

THE WITNESS: One wheel with two cables.

THE COURT: It's a single cable, but it comes in, goes around the wheel and comes out?

THE WITNESS: That's what we refer to as the two parts.

THE COURT: The two parts are the part coming in and the part coming out?

THE WITNESS: That's right.

THE COURT: All right.

BY MR. CORCORAN:

Q Is that some engineering or physical way by which having a two-part block it lifts a certain capacity?

A That's right.

Q In other words, it has a greater lifting capacity than say a single cable?

A Yes.

THE COURT: You are spreading the weight over the cable coming in and the part coming out.

THE WITNESS: Hoisting capacity.

Q Were you familiar with the lifting capacity of the two-part block on the R-5?

A Yes, I was.

Q What was it?

A 36,000 pounds. That's maximum lift.

Q That is 18 ton.

A That's correct.

Q Had you worked on the R-5 prior to this date?

A I was on the R-5 approximately five years as an oiler. Four or five years as an oiler when I first started with Rudolph.

Q Prior to November 14th when last had you been on the R-5?

A I couldn't say. It might have been a couple of years.

Q Did you tell anyone about the two-part block and your belief that it was insufficient to lift these containers?

A Yes. I informed the pier superintendent.

Q What is the pier superintendent's name?

A Joe Chuck.

Q Well now, his right name, I think, or rather, his correct name, is Maguilo, Joseph Maguilo.

Now, you call him Joe Chuck. Is that the name he is colloquially known around the piers as?

A Well, I know him as that because people call him that, and he also on his safety helmet it says ITC Pier Superintendent Joe Chuck.

Q He even adopts that name himself on his helmet?

A Yes.

Q When you told Joe Chuck that the R-5 was not going to lift these 50,000-pound containers, what did he say or do?

MR. HOCKETT: I am going to object, if the Court please, to what he said. It is hearsay. Explain what he did.

THE COURT: Well, he is an employee of your client.

MR. HOCKETT: He is, Judge.

THE COURT: Overruled.

MR. CORCORAN: He is the pier superintendent.

THE COURT: Overruled.

Q You may proceed, Mr. McSweeney.

A Mr. Corcoran, could you ask me the question again, please?

THE COURT: What did he say or do?

A I informed Joe Chuck, as I know him, that we couldn't lift up the containers. And Mr. Chuck started ranting and raving and using foul and abusive language and started waving his fists at me almost in a threatening like manner that I thought he was going to hit me.

MR. HOCKETT: Objection, if the Court please.

THE COURT: Strike that out.

Ladies and gentlemen, when I strike testimony out obviously you have heard it, and we are all human, but to the best of your ability you are to put it from your minds and not consider it in any way.

Now, Mr. McSweeney, the jury is going to have to decide this case on the fact, not on what your conclusions from these facts are. So limit yourself to telling us what he did, not what you thought he did, but what he did. Describe what he did, and in some way if you want to get into what he said to you, you can tell us what he said to you.

All right.

Q Mr. McSweeney, did Mr. Maguilo, Joe Chuck, raise his hands?

THE COURT: No, that is leading. Let's ask Mr. McSweeney what he did.

What did he do?

THE WITNESS: Well, he started to rant and rave and use foul and abusive language.

MR. HOCKETT: Objection.

THE COURT: No, strike that. He said something to you. Ranting and raving is your conclusion from what he said to you. What did he say to you?

THE WITNESS: Well, your Honor, I'm not going to use language in the courtroom in front of the ladies.

THE COURT: Well, leave out what he said if you don't like the adjectives.

Q You call it by a letter.

THE COURT: We are all aware that men working on piers don't always use the King's English on every occasion, so go ahead.

A Well, he told me that I had all f'ing day the day before to change the rigging on the crane to be able to lift the containers.

THE COURT: Yes, what else?

THE WITNESS: And he told me that he was going to call up Rudolph and get me fired.

THE COURT: Anything else?

THE WITNESS: And he just kept going on and on and on, but his exact words --

THE COURT: You said something about he did something with his arm.

What did he do with his arms?

THE WITNESS: He was shaking his hands like this (indicating), you know, like he was having a temper tantrum.

THE COURT: I see.

All right.

BY MR. CORCORAN:

Q Were you concerned that he might put into effect what you were observing?

THE COURT: No. Sustained. Sustained.

You can ask what he did and the jury will draw its own conclusion.

Did he advance toward you at any time, Mr.

McSweeney?

THE WITNESS: Well, we were standing like, you know, nose to nose.

THE COURT: Was his fist in your face in any way?

THE WITNESS: He didn't strike me, your Honor.

Q But his Honor said was his fist in your face?

A Well, we were, you know, face-to-face. I wasn't arguing with him. He was doing all the hollering. I was just standing there, you know. I had nothing to argue about. I didn't know what the heck was going on. I hadn't been there the day before.

Q Had Joe Chuck complained that the men on the R-5 the day before had done nothing?

A He told me that I had done nothing the day before, that I had all day long to get help to change the rigging.

Q Did you ask Mr. Chuck for help?

A Yes, I did.

Q Tell us please what he replied?

THE COURT: What did you say to him and what did he say to you?

THE WITNESS: I asked him for some help to change the block, and he told me to change the f'ing block myself because I had four or five hours at the pier yesterday and I could have done it and he could have supplied the help because he had men around to help.

MR. HOCKETT: Your Honor, I am going to object to that, men around.

THE COURT: Well, that is what he says Mr. Chuck said to him.

MR.HOCKETT: No, if the Court please --

THE COURT: Let's read the answer back.

(Record read.)

THE COURT: That's what he said to you.

THE WITNESS: That's correct.

MR. HOCKETT: Oh, I am sorry.

Judge, I think the witness said on his own observation he saw men around saying that Maguilo could have supplied help because there were men around.

THE COURT: No, he wasn't there the day before.

MR. HOCKETT: No. I am talking about the very morning this conversation took place. An opinion on the witness' part that he, Mr. Joe Chuck, could have supplied help because there were four men standing around doing nothing, which is an opinion and conclusion on this witness' part.

THE WITNESS: Maybe I can clear this up.

THE COURT: Are you giving us just what the two of you said to each other?

THE WITNESS: He said to me that I had four or five hours the previous day to change the block and he had men that he could have given me to help me on the previous day because they weren't working because of the inclement weather, they weren't working the ship.

THE COURT: I understood that.

All right, go ahead.

BY MR. CORCORAN:

Q When you saw this ITO trailer truck come in did you later see any men get on top of the container?

A Yes.

Q Who were these men?

A They were longshoremen.

Q Employed by whom?

A ITO.

Q Did you see them doing anything, did they have anything in their hands?

A Yes, they grabbed hold of the hooks that were suspended from the block of the crane and they were going to hook up the container.

Q The four corners of the container?

A That's correct.

Q Did they have a spreader bar there?

A I don't remember whether it was a spreader bar or whether it was for wires.

Q Did Mr. Maguilo, or Mr. Joe Chuck complain that those four men were being idle because you had not changed the block?

THE COURT: Yes, yes, sustained. It is leading.

Let's get these from the witness, Mr. Corcoran.

Q Did Mr. Chuck make any reference to these men around the container?

A Well, when he was arguing with me about the crane not being ready to work at eight o'clock in the morning, that now he had, you know, the weather was okay to work, that now the crane was holding him up, that I was holding him up, and these men were there and he had to pay them to wait.

Q Did he mention about any other gangs of longshoremen that --

A He had a --

MR. HOCKETT: Again, your Honor, I must object.

THE COURT: Overruled.

Q Did he make any mention to you about the men on the vessel?

A He said the gang of men on the ship are waiting the arrival of the R-5 alongside to load the containers onto the ship.

Q What did he say about that gang of men that were on the ship awaiting the --

THE COURT: If anything.

A Well, he said that he had a gang of men standing by now because I didn't do my job yesterday, that I was holding him up.

Q When he mentioned the ship, was that the Yamawaka Maru?

A That's correct.

Q Could you see that vessel from the R-5?

A Yes.

Q How far away was it?

A 50, 75 feet.

Q Could you tell us please approximately what the length of the Yamawaka Maru is?

A About 500 feet.

Q And the beam, or the width?

A I think it's about 60 feet.

Q Did you ask anyone for any equipment in changing over the four-part block?

A Well, I looked for a tag line to attach to it, you know, help position it on the ground so we could properly lead it up, but in all the excitement and hurrying, and this guy breathing and hollering --

THE COURT: No, strike that out. Let's lay a little bit of foundation here for some of this.

You have to put in a four-part block because you can't lift with the two; right?

THE WITNESS: Yes.

THE COURT: Where is the four-part block all this time? Is it on the deck?

THE WITNESS: It's on the deck of the crane.

THE COURT: So what happens when in the normal circumstance you change from a two to a four? What do you do?

THE WITNESS: Well, I holler up to the engineer -

THE COURT: No. Normal circumstances.

You change from two to four from time to time in the course of your work?

THE WITNESS: Yes.

THE COURT: What do you do in the normal practice when you change it? You bring down the --

THE WITNESS: You bring down the two-part over the deck, you have a sling that you hook onto the four-part, the operator will bring it up, swing it over the dock to the pier and boom the crane down on to the pier to enable you to, you know, to work.

THE COURT: But you have got the two-part block at the end of the two parts and up at the top you have got a shackle or something that holds one of the parts, and the other part goes over another pulley, then goes down to the drums inside --

THE WITNESS: Right. You have a dead-end on one end of the block.

THE COURT: All right.

Now you are going to have to end up with two pulleys at the bottom and two pulleys on top, and one dead-end and three that are working; right?

THE WITNESS: That's right.

THE COURT: How do you go about that in the normal course of events in making such a switch?

THE WITNESS: Well, you have to pick up the four-part block off the deck of the crane, swing it over on to the pier, lower the boom down and the four-part block actually is the load suspended from the two-part block. And that four-part block has to be landed properly on the pier at a certain distance, you know, from the boom, to enable you to lead the cables through. In other words, to convert two parts to four parts to give you more capacity.

THE COURT: When you do that normally, what do you do? Do you do that by yourself?

THE WITNESS: No, we have help. We always have help.

BY MR. CORCORAN:

Q I don't know where in our testimony we have reached. Having in mind his honor's questioning of you, did you go about to change from the two to four part block?

A Yes. Yes, we did.

Q Did the engineer, Mr. --

THE COURT: What did you do?

MR. CORCORAN: I thought your Honor's questions brought that out.

THE COURT: No, we are now getting down to what he did this particular morning.

MR. CORCORAN: Oh, I see. All right.

Q Now tell us, Mr. McSweeney, where this four-part block was?

A The four-part block was on the deck of the R-5. On the bow.

Q Did the engineer lower the load at the end of which was the two-part block?

A Yes, that's correct.

Q That's the one that was on when you came aboard?

A That's correct.

Q When he lowers the two-part block it has a hook on it, does it not?

A Yes, it does.

Q What did you do with that hook?

A I hooked the four-part block onto the two-part block.

Q Did the engineer then hoist it?

A Yes, he did.

Q When he hoisted it at what angle was his boom then?

THE COURT: No, Mr. Corcoran, I think we should not lead in this area. I think this gentleman was there, let's have him tell us what happened.

All right.

MR. CORCORAN: Thank you, your Honor.

A The engineer picked up the block almost to the tip of the boom, swung it over the dock, proceeded to boom the crane down so it would rest, eventually rest on the pier.

Now, we got the block to a position of five to six feet above the surface of the pier, the deck of the pier. I put my hands on the hoook of the four-part block.

Q Now, when you put your hands --

THE COURT: No, keep going. What happened?

THE WITNESS: I put my hands on the four-part -- on the hook of the four-part block to guide it to an on-edge position with the hook facing the crane, otherwise it would be impossible to reave the block without having it come out all twisted up. In other words, to reave it properly. And the engineer boomed it down to five or six feet above the dock and he stopped, at which point I put my hands on it.

Now, suddenly the block twisted and lurched forward and to the left causing me to have a severe pain and a knife-like pain in the back, and I fell over onto the pier.

THE COURT: You said twisted and lurched to the left?

THE WITNESS: Yes, sir.

Q You say that when you put your hands onthe block, was that a height of about five or six feet?

A That's correct.

Q Thereabouts. And you say that the engineer had completely stopped movement?

A That's correct.

Q Could you hear if the drums were moving? Could you tell that the crane had been stopped?

A Oh, I knew it was stopped.

Q Before you went on to the pier, or, after you went on to the pier and before the load was lowered, did you have any conversation with the a man known as Joe the Harbor Master?

A Joe the Harbor Master had heard this conversation with Joe Chuck, and he said, don't pay any attention to him.

THE COURT: Just a minute now.

Who is Joe the Harbor Master and where does he fit into this picture? Let's get that established.

Who is he, Mr. McSweeney?

THE WITNESS: Well, as I know him the harbor masters are employed by stevedores in shifting lighters, which are better known as barges, or helping -- he would go on the ship and take the lines of the crane as we came alongside the ship while I would tie it up.

Q Did you know that Joe the Harbor Master was employed by ITO?

MR. HOCKETT: I will object, your Honor.

Q Do you know?

A Yes.

THE COURT: Yes, sustained.

How do you know? What is the basis for your knowledge?

Q Tell us please how you know that Joe the Harbor Master was employed by ITO?

A Because I had worked with Joe the Harbor Master and that's the only way I could find it. I know that he was an employee of ITO.

Q Did he at any time --

A He wore a hard hat that said ITO on it.

MR. HOCKETT: I object, your Honor.

THE COURT: Is that a sufficient basis for employment by ITO, the fact he has a hat?

MR. CORCORAN: Usually when you see a man with a --

THE COURT: I am not asking you. I am asking a legal question.

Is that in your opinion enough to --

MR. CORCORAN: Are you addressing me, your Honor?

THE COURT: Yes, I am.

MR. CORCORAN: I say that helmets are used in construction and harbor work, and it is required, I think under the law, and everyone has an identification on his helmet. We know that in construction white helmets are used by bosses, and say if it was an electrician he might wear a green helmet, and the engineer might use a blue one. This is commonplace. Everybody knows the particular trade by the color of the helmet. And when a man has ITO on it we know he is employed by ITO and is not employed by someone else.

THE COURT: I will tell you what we are going to do, we are going to recess for lunch until a quarter of two. If the lawyers will stay here I will discuss this with you.

Until a quarter of two.

(Jurors leave.)

THE COURT: Now, who is Joe the Harbor Master employed by? Do the depositions establish that? Did anybody establish that in the depositions?

MR. CORCORAN: I think I have it here on the deposition of --

THE COURT: If there is no question about it, I don't see why we are spending a lot of time on it.

Is he employed by ITO?

MR. HOCKETT: I suggest you look at Mr. Maguilo's deposition.

THE COURT: The next question is, what do you expect him to say the harbor master said to him?

MR. CORCORAN: He offered to help him but then declined.

MR. HOCKETT: I don't think, your Honor, that an offer of help from an employee is within the scope of his employment. I further contend that any help by Joe the Harbor Master was of his own accord and without any authority to do so on the part of ITO.

THE COURT: You say he offered to help?

MR. HOCKETT: If that's his contention.

THE COURT: Let's assume that's true. Joe the Harbor Master who is an ITO employee offers to help, then what?

MR. CORCORAN: Then he doesn't. They have this argument with Joe Chuck, and there's a whole change of position.

THE COURT: Then he withdraws his offer of help?

MR. CORCORAN: Well, he didn't help. He didn't formally withdraw it, but he didn't do anything.

THE COURT: But it seems to me that's irrelevant because there is no duty to help.

MR. CORCORAN: That's a question, your Honor, we can show custom and practice.

MR. HOCKETT: Oh, no.

MR. CORCORAN: Yes, yes. This has been the practice, and I think I can lay a foundation for that.

THE COURT: But what you are doing is you are making Joe the Harbor Master do work on the deck of the Rudolph vessel with the risk of possible injury, and who is responsible --

MR. HOCKETT: Your Honor, he just --

THE COURT: The compensation, if any, and all the rest of it.

MR. CORCORAN: Your Honor, they were doing this work on the pier where Joe the Harbor Master is, and it's the pier of ITO which rents and leases it year-round.

THE COURT: I know, but the question is whether as a matter of law ITO has any requirement of giving help.

MR. CORCORAN: Irrespective of that. If there is a volunteer, your Honor --

THE COURT: Yes, but he didn't go through with it.

MR. CORCORAN: Excuse me. If he is a volunteer and it is a custom and practice for these people, and these are not just employees, these are in supervisory capacity, Mr. Chuck is 21 years the marine superintendent, these are bosses.

THE COURT: First there has got to be some duty on his part to assist that he breaches, and I don't see that.

MR. CORCORAN: I respectfully state, your Honor, that if a foundation, a proper foundation is laid, that it had been the custom of the employees of ITO to assist in changeover of blocks, because it is to their interest to get this vessel loaded as quick as possible --

THE COURT: Let me go to the next question. Let's suppose there is and he doesn't do it. Isn't it then incumbent on plaintiff McSweeney here to say, if I don't have any help I'm not going to touch this job?

MR. CORCORAN: Yes, but, your Honor, he must also bear in mind that Joe Chuck is breathing down his neck in a threatening manner.

THE COURT: Well, that's another question.

MR. CORCORAN: And if you are familiar with dock and pier practices sometimes you have to do what someone else tells you to do even though you don't want to do it.

THE COURT: Now, what would the law be if the man knows that they have to have help for this and he doesn't have help for it and he tries to do it anyway?

MR. CORCORAN: He was forced to do it. He is forced to do it.

MR. HOCKETT: By who?

MR. CORCORAN: First of all the marine superintendent of ITO is --

MR. HOCKETT: He is not his employer.

MR. CORCORAN: He takes his orders from him.

THE COURT: We are talking now about negligence, or unseaworthiness. We have got to come under one of those two --

MR. CORCORAN: That's true. We are claiming it as against Rudolph. Rudolph didn't supply any additional help. And in answer to your Honor's question, Mr. McSweeney --

THE COURT: You mean a worker who normally has had and doesn't have it can say it's negligence because I wasn't furnished help that my boss wasn't told I ought to have. That's one thing, so where is the duty to be performed that is not performed?

Secondly, how does it make the vessel unseaworthy when he doesn't have the help that he hasn't asked for?

MR. CORCORAN: Your Honor, the cases are too numerous to mention, but I'll get them, that if a complement of a crew is insufficient, Judge Learned Hand says that this vessel is unseaworthy. You can be unseaworthy by having oil or grease --

THE COURT: I know, butthe complement of the crew has got to be under circumstances where somebody expects a certain complement.

MR. CORCORAN: Sure, they know that they are going to go to --

THE COURT: And here all of a sudden he needs one more man and he doesn't have it. Certainly nobody can contend that he couldn't have gotten on the telephone and said, hey, Rudolph, send me down one more man.

MR. CORCORAN: You are arguing, if I may say so respectfully, the weight of the evidence.

THE COURT: I don't know that I am.

MR. CORCORAN: And you are moving in that area, whereas the facts will show, and we haven't completed our testimony with this witness, as to what efforts he made to get it and what was told to him. And we have already the proof offered by this witness --

THE COURT: Well, I don't need to get into that. I thought this was a fairly simple evidence point, and the question now remains as to whether he can testify as to a conversation he had with Joe the Harbor Master in wich he said, I'll help you, and later on he is going to testify that he did not in fact help, at some point he said, I'm not going to help you. And it is conceded that whoever Joe the Harbor Master is employed by is not employed by Rudolph.

MR. CORCORAN: No, he is the marine superintendent of ITO for 2[illegible] years.

THE COURT: Is there any question about that?

MR. HOCKETT: I don't know, Judge, if there is any question about that. There is certainly a question about an offer of help, No. 1 and, No. 2, whether or not an offer made but not actually performed wouldn't somehow cast us in a liability --

THE COURT: I will reserve decision over lunch. I will see you at a quarter of two.

MR. CORCORAN: It certainly lulled Mr. McSweeney into the blief that he was going to get help.

(Luncheon recess.)

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AFTERNOON SESSION

(1.50 p.m.)

(Open court - jurors present.)

THE COURT: Mr. McSweeney, if you will come back to the stand.

I am going to sustain the objections to the conversation, if any, with Joe the Harbor Master.

MICHAEL McSWEENEY, resumed.

DIRECT EXAMINATION (Continued)

BY MR. CORCORAN:

Q Mr. McSweeney, after you fell did anybody come to help?

A Yes, there was several men came around.

Q Among those men do you know who was present?

A There's only one that I knew that was Joe Chuck.

Q What if anything did Joe Chuck do for you when you were on the ground?

A Well, he assisted the men in placing me on a pallet, because I couldn't get up, and he -- in fact, I remember him saying to the men that, you know, he told somebody to grab me by the feet and somebody to grab me by the shoulders and he grabbed me around the belt to support my back, because I remember him saying I have to grab him around the belt to support his back to lift him up on the pallet.

Q Where did they place you?

A They took me inside the pier on the forklift truck.

Q Before you entered on this operation of changing over to the four-part block did you observe what appurtenances or equipment was on the deck of the R-5?

A Yes, I did.

Q Did you see any rope or tag lines?

A No, I didn't.

Q Incidentally, were you working for the Rudolph Company yesterday?

A Yesterday?

Q Yes.

A Yes.

Q Did you make any changeover then?

A No.

Q You were working the day before this accident at 21st Street?

A That's correct.

Q Is that an ITO pier?

A Yes. It was at the time.

Q Do you know that you made it a changeover to four or five-part block?

A Yes, I did.

Q Did the ITO men help you then?

MR. HOCKETT: I am going to object, your Honor.

THE COURT: Yes. Sustained.

MR. CORCORAN: He's testifying to a fact, your Honor.

THE COURT: Sustained.

Q When you fell to the ground and were being lifted up, did you see Mr. Joe the Harbor Master there?

A I don't remember.

Q Had he been in the vicinity when you were changing over the --

A He was when I started to.

Q Was he there after the hollering that Mr. Joe Chuck gave you?

A He was there during the hollering.

MR. CORCORAN: Can I make an offer of proof on that, your Honor, as to the conversation with Mr. Joe the Harbor Master?

THE COURT: Well, we can do that in the recess during the middle of the afternoon.

MR. CORCORAN: All right.

Q Now, some time after you were brought inside the pier building did an ambulance come?

A That's correct.

Q Where were you brought to?

A Long Island College Hospital.

Q In the ambulance?

A Yes.

Q How did they lift you up?

A Under each armpit.

Q Excuse me?

A Under each armpit.

Q But when they brought you in did they put you on a pallet on a hi-lo machine?

A To bring me into the pier.

Q Yes. Then the ambulance backed in?

A Backed in.

Q And they put you in the ambulance and you were taken to Long Island College Hospital?

A Right.

Q Where was that, in the emergency room?

A That's correct.

Q Tell us please what they did for you there?

A This is like five, six years ago. They took x-rays, I believe they took x-rays. They examined me and they gave me two injections for pain, to the best of my recollection.

MR. CORCORAN: I understand, your Honor, that the Long Island College Hospital records and the Overlook Hospital records, which are subpoenaed are here, and I would like to offer them in evidence.

THE COURT: Are you going to examine this witness in connection with them?

MR. CORCORAN: Well, it would help me in the event I see the record to propound some questions to him.

THE COURT: Is there any objection to that?

MR. BROWNE: I would like to see it, if I may, your Honor.

THE COURT: The only question is whether they should go into evidence at this point. Is there any objection to their going into evidence at this moment?

MR. BROWNE: No.

MR. CAMPBELL: No.

MR. HOCKETT: No.

THE COURT: All right, then, they may be received.

(Plaintiff's Exhibit 5 was received in evidence.)

xx THE COURT: Subject, I am sure, to the usual opportunity to look at certain portions and give further consideration, if necessary.

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THE CLERK: That's all I have (handing).

BY MR. CORCORAN:

Q How long did you remain at the Long Island College Hospital?

A A couple of hours, best of my recollection.

Q Were you discharged?

A Yes.

Q To your home?

A No, I received a call from James Rudolph that he was on his way up to the hospital.

Q Did Mr. James Rudolph come to Long Island College Hospital?

A Yes, he did.

Q What if anything did he do for you?

A He wheeled me out of the hospital in a wheelchair, assisted me into his car and was going to drive me home.

Q Did Mr. Rudolph drive you home?

A Yes, he did.

Q To New Jersey?

A Yes, he did.

Q When you arrived home what if anything did you do then?

A My wife called a physician, a doctor.

Q Do you know the name of that doctor?

A Dr. Guedelis.

Q Did Dr. Guedelis come to your home?

A Yes, he did.

Q When he came to your home where were you situated?

A I was on the living room floor.

Q Supine, laying up, what?

A Couldn't move.

Q Did Mr. Guedelis examine you?

A Yes, he did.

Q What if anything did he do for you?

A He gave me an injection and he told my wife, showed her how to make a heat pack, a wet heat pack with plaster, hot towels and the heating pad over it, and he told her, I remember him saying that there was no sense in putting me in the hospital at the time because they really couldn't do anything for me right then and there.

MR. BROWNE: I object and move to strike, your Honor.

THE COURT: No, I will let it stand. Is this the subject of yesterday's deposition?

MR. BROWNE: No, your Honor. I doubt that Dr. Guedelis is going to -- Dr. Guedelis was not deposed to my knowledge, and what he said is nowhere substantiated in any document that I have except the testimony of the witness.

MR. CORCORAN: He will be here tomorrow morning at 10 o'clock.

THE COURT: I will allow it to stand. Go ahead.

MR. CORCORAN: Incidentally, your Honor, maybe I should make this --

THE COURT: Just go ahead with your next question.

Q Did Dr. Guedelis again visit your home?

A No, I visited him in a few days. I don't recall exactly.

Q You visited him at his office?

A That's correct.

Q Tell us, please, what he did for you then.

A Well, he examined me and he said that I should see an orthopedic specialist.

Q Did he refer you to an orthopedic specialist?

A Yes. He referred me to Westfield Orthopedic Group, Dr. Cook, and he made the arrangements and I went to see him -- I went from his office to Westfield Orthopedic.

Q How did you travel from Dr. Guedelis's office to the Westfield Orthopedic --

A My wife drove me.

Q When she drove you, will you tell us, were you experiencing any pain?

A It was very painful. Every little bump that we would hit I would have a severe pain in the back. And I had difficulty in getting in and out of the car, too.

Q When you went to the Westfield Orthopedic Group, what doctor did you come under?

A Dr. Cook.

Q Did you give Dr. Cook a history of this occurrence?

A Yes.

Q Did you also give a history of the occurrence to Dr. Guedelis?

A Yes.

Q What, if anything, did Dr. Cook do for you?

A Well, he gave me medication, and he had me go for diathermy treatments. I don't know, a couple of times a week. Which was something similar to an infra red lamp of some type, and with a massage to the lower back.

Q Where was this diathermy treatment applied? What part of your body?

A The back. Lower back and neck.

Q Did you again visit Dr. Cook at the Westfield Orthopedic Group?

A Yes, I did.

Q Tell us, please, how many times would you estimate you visited him at his office?

A Several times. I was going twice a week, maybe three times a week for either, you know, a visit and diathermy, or diathermy, you know, which was in the same building.

Q Did there come a time, Mr. McSweeney, when Dr. Cook referred you to a hospital?

A Yes, he did.

Q Whathospital was that?

A Overlook Hospital.

Q Where is that located?

A It's in Summit, New Jersey.

Q Did you go to that hospital?

A Yes, I did.

Q Were you confined there?

A Yes, I was.

Q For how long a period of time were you confined there?

A About ten days.

Q During that period of ten days did Dr. Cook visit you daily?

A Yes, he did.

Q In that period of ten days tell the Court and jury, please, what treatment was given to you.

A I was in traction from the hips, I had weights on each, you know, they put a thing around your waist, around your hips, and it extends out over the bed and they have weights on it and they pull on your spine. And I also received neck traction for my neck, and I also received diathermy treatments at Overlook Hospital.

Q During the --

A And medication.

Q How many days were you in Overlook?

A I think it was about ten days.

Q During those ten days were you in traction every day?

A Yes, I was.

Q Was it painful?

A Yes, it was.

Q Did you continue to complain of pain in the lower back?

A Yes, I did.

Q At the conclusion of this ten-day period were you discharged from Overlook Hospital?

A Yes, I was.

Q Were you discharged to your home?

A Yes, I was.

Q Now tell us, when you arrived at home did you go to bed or did you stay up, or what?

A No, I went to bed.

Q Can you tell us how long you were confined to bed at home?

A Actually I wasn't confined. If I felt as though I could, you know, I could get up for a while, then if I would become more painful or become tired, I was to lay down and relax.

Q Did you again see Dr. Cook?

A Yes.

Q Do you remember when that was?

A Probably shortly after I -- I think shortly after I was discharged from the hospital.

Q During this period you were either confined to your bed or to your home, did you continue to feel pain?

A Yes, I did, but it was, you know, it was relieved as compared to when I went into the hospital

Q Had Dr. Cook prescribed any medication for you?

A I believe I was on muscle relaxants. I'm not sure.

Q But whatever the prescriptions were Mrs. McSweeney had them filled for you, is that right?

A That is correct.

Q During this period of time had you returned to work at all?

A What period of time, sir?

Q From the time you were discharged from the hospital.

A I returned to work about a month after I was discharged from the hospital.

Q Would that be on or about March 1, 1971?

A Yes, it was March 1.

Q Did you return to work for the Rudolph Company?

A Yes, I did.

Q When you returned, what type of work did you do?

A I was placed on light duty.

Q Did you do any work aboard a crane as an engineer or as an oiler?

A No, I didn't.

Q Where did the Rudolph Company assign you?

A I was in the yard in Port Newark.

Q In Port Newark?

A That's right.

Q You speak about the light duties. Tell us what they were.

A More or less looking at the equipment, seeing what had to be done. At the time they were changing an engine on one of the rigs, and I supervised it and laid the whole job out, and so on, and so forth.

Q But you did very little physical work?

A I did no physical work.

Q At the time of this occurrence on November 14, 1970, tell us approximately what your weekly wages were.

A Approximately $400 a week.

Q Was that on a 40-hour basis?

A Yes, just about. Maybe a little less than that, I am not sure what the rate was.

Q Would you up to this time also be receiving overtime work?

A Yes.

Q Isn't it true when you start to work a shift you have to continue until it is loaded or unloaded?

A That's right. Occasionally we work 24 hours non-stop.

Q In other words, a ship has to leave at a certain time and date?

A That's right.

Q And sometimes that is determined by the tides?

A Well, usually they have the barge --

MR. CAMPBELL: I object to this line of questioning. It is outside the scope.

THE COURT: Yes, sustained.

Q Tell us roughly, Mr. McSweeney, how much overtime did you receive prior to this accident? Roughly. Per week.

A There's a lot of weeks we worked 20 hours overtime.

Q 20 hours. What would you say would be your average overtime over the course of a year, perhaps?

A That would be a very hard thing for me to try and, you know, even figure out here. I'd just be guessing, Mr. Corcoran.

Q You said sometimes you work 20 hours. That wasn't every day, was it?

A No. I mean per week.

Q Oh, 20 hours per week?

A Per week overtime.

Q Would that be average overtime?

A No, that would be above average. There were times I worked 40 hours per week overtime.

Q What I am trying to inquire of, what would you say would be the mean average of your overtime? You mentioned that sometimes you worked 20,sometimes you worked 40 hours a week.

A Well, I know I lost, being out of work, 16 weeks. I know I lost $7500 in wages.

MR. CORCORAN: Subject, your Honor, to the fair and reasonableness of the monetary expenditures such as hospitals and doctors, can we inquire generally of this witness because the proof will come from the doctor whom we deposed yesterday as to the amount of expenses that he paid.

THE COURT: Taking it subject to connection.

MR. CORCORAN: Subject to connection.

THE COURT: All right.

Q Mr. McSweeney, did you pay the bill of Overlook Hospital, or was it paid on your behalf?

A To the best of my knowledge it's still outstanding.

Q Did you receive a bill from Overlook Hospital?

A Oh, yes, I did.

Q Was that in the sum of about $600?

A I don't remember.

MR. CORCORAN: Your Honor, rather than delay the trial I have them in my briefcase, the figures, and with your Honor's permission I will put it into the record when I receive the papers.

Q Did you also receive a bill from the Long Island

College Hospital?

A Yes, I did.

Q Did you receive a bill from Dr. Cook?

A Yes, I did.

Q Did you receive a bill from Dr. Gudelisdo?

A Yes, I did.

Q Did you incur expenditures for medications?

A Yes, I did.

Q Did you also incur a bill from a Dr. List?

A Yes, I did.

MR. CORCORAN: That's all of this witness at this time, your Honor.

MR. BROWNE: May we approach the bench, your Honor?

THE COURT: Surely.

(At the side bar.)

MR. BROWNE: Your Honor, we paid all these bills and, therefore, I don't think they should be proved, if they are proved there should be a withdrawal. This is cure and maintenance. I have a letter here from Rudolph which says, sending copies of disbursements, and I see the Overlook Hospital,here is the Brooklyn Hospital bill, and here is the -- here is the Overlook, $692. This is our obligation to pay this regardless of anything, youknow, this is the maintenance we pay. So I think that should all be stricken.

THE COURT: How about this, Mr. Corcoran?

MR. CORCORAN: What's the --

THE COURT: He thinks the testimony about the proposed bill should be stricken and that they have all been paid.

MR. CORCORAN: No, these are the items of damage under the Jones Act.

THE COURT: I can't have a double recovery.

MR.CORCORAN: They weren't paid on his behalf. They are outstanding.

MR. BROWNE: I doubt it. I sincerely doubt it.

THE COURT: Wait till you find out what the story is about this payment.

MR. BROWNE: This is a letter here from a man who testified -- I am morally certain that they were paid.

MR. CORCORAN: The maintenance and cure doesn't cover the --

MR. CAMPBELL: He's talking about the doctors' bills.

MR. BROWNE: Sure.

MR. CORCORAN: Well, these are items of damage.

MR. BROWNE: No, they are not. You can't have a double recovery.

MR. CORCORAN: If you advance the money it still is an item of damage.

MR. BROWNE: We didn't advance the money, we paid cure. The cases that go --

THE COURT: Let me suggest this to you. Why don't you cross-examine and finish your cross-examination on everything except the medicals. Bring in an authority or two for me to look at. I seem to recall the ones I have looked at on past occasions.

MR. BROWNE: I will bring it tomorrow.

THE COURT: All right.

(In open court.)

MR. BROWN: May I proceed, your Honor?

THE COURT: You may.

MR. CORCORAN: Excuse me. Might I ask one question of the witness on direct with regard to the photographs, your Honor?

THE COURT: Surely.

BY MR. CORCORAN:

Q Mr. McSweeney, I refer you to Plaintiff's Exhibit 1 in evidence and I ask you does the block that we are talking about here appear in that photograph?

A Yes, sir. Right here, sir (indicating).

THE COURT: That's the four-part block.

Q The four-part block?

A Four, or it can be rigged up five, your Honor. That happens to be rigged up five.

Q Is that the block that was in question?

A That's correct.

Q This is the block that weighs approximately a thousand pounds?

A That's correct.

MR. CORCORAN: All right.

CROSS EXAMINATION

BY MR. BROWNE:

Q Mr. McSweeney, how old are you?

A 38.

Q How long have you worked for Rudolph?

A Approximately 13 years.

Q You started when you were about 25?

A That's correct.

Q At that time the company was run by Arthur Rudolph?

A That's correct.

Q Who is in charge of the company now?

A James Rudolph.

Q Arthur Rudolph is dead?

A That's correct.

Q And the gentleman in charge of the company today is the gentleman who drove you from Long Island College Hospital to New Jersey?

A That's correct.

Q You knew him for the whole time you were working there?

A I wouldn't say the whole time, but for a good part of the time, yes.

Q When you said 13 years, did you mean 13 years ago today, or 13 years ago --

A 13 years today.

Q So you were working there about nine years, I guess, is that fair to say?

A Eight would be closer to it.

Q How long had you been working on -- I know you didn't work full time, but how long had you been working on the R-5? How many years.

A How many years did I work on the R-5?

Q Yes.

A I had spent about, I don't know, probably four, five years on the R-5.

Q What about the R-6?

A The remaining years I have been on the R-6.

Q I'm talking now before the accident, not now. Just answer my questions as of the date of the accident?

A As of the date of the accident?

Q Yes.

A I had spent maybe five years working on the R-5, and maybe three years working on the R-6. Approximately.

Q Then at that time you were an oiler?

A Yes.

Q Had you ever been fired?

A No, sir.

Q Were you a member of the union?

A Yes, I am.

Q When did you become a member of the union?

A 1962 or '3.

Q What union is tht?

A The International Union of Operating Engineers.

Q Do you know if there is a union contract that covers your employment, that covered your employment in those days?

A Yes, there is.

Q How many men were customarily assigned to the R-5 in November, November 14, 1970? How many men would customarily.

A Two men.

Q What were they called?

A The engineer and the oiler.

Q And you had the title of the oiler?

A That's correct.

Q Who was the highest paid?

A The engineer.

Q He was the guy who operated the crane?

A That's correct.

Q For the period that you worked on the R-5 was that always the situation, that there were two men?

A The period that I worked on the R-5?

Q Yes.

A You are talking about previously to this?

Q Previously, yes.

A Yes.

Q Was the same situation true with the R-6?

A Yes.

Q Tell me about these blocks, is it true that if you have a two-part block it doesn't lift as much weight, but it works a bit faster? Is that fair to say?

A Well, it depends on the load. How heavy the load is.

Q Let's assume light loads.

A Light loads you might even work with a single lip.

Q Would it work faster with a two-by block than with a four-by block?

A Yes.

Q So then it would be customary to lift light loads with a two-part block, or even a one-part block -- a one-part block wouldn't be a block, would it?

A Not customarily.

Q Lighter loads?

A Lighter loads, but in containers the weights vary, but you never work where there is containers that only weighed 18 ton or less.

Q Do you know what cargo was being loaded the day before?

A No, I don't.

Q Do you know what the weather conditions were the day before?

A The day before?

Q Yes. In the afternoon.

A It rained.

Q How long was it raining, do you know?

A I don't know. I really couldn't say.

Q You were a few miles away, was that your testimony?

A Several.

Q Seven?

A Several.

Q But on the Brooklyn waterfront?

A That's correct.

Q Did you work the afternoon before a full day or did you break off?

A I believe the gangs knocked off.

Q When did the gangs knock off?

A I believe at noon time.

Q In other words, it is your testimony then that you didn't do any work in the afternoon of the day before because of the weather; is that correct?

A Oh, I did work, yes.

Q What did you do?

A I changed the rigging on the R-6.

Q You changed the rigging on the R-6. Did that take you the whole afternoon?

A It took me a couple hours.

Q What were you changing rigging to and from?

A We either were going from a four or five-part block or a four to a five-part block, I don't recall. I know we were changing the rigging.

Q Where were you when you were changing the rigging?

A Where was I?

Q Where was the R-6?

A At 21st Street in Brooklyn.

Q That's an ITO pier?

A Yes.

Q And you worked out in rain?

A That's correct.

Q On the pier?

A Correct.

Q Did you use a tag line that day?

A I was the engineer that day.

Q Oh, you were operating that day?

A Yes.

Q Let's go to the morning of your accident. I think you said you got there about 7:30. Was the engineer there then?

A No, I don't believe so.

Q Then there came a time when you found out that you would need a heavier block?

A Yes.

Q Did you use a sling to affix the four-part block to the two-part block?

A Yes, I did.

Q Who did the rigging of the two-part block to the four-part block?

A I did.

Q Where did you do that, on the vessel?

A On the deck.

Q Did you at that time look to see if there was a tag line on the vessel, on the deck of the vessel?

A Yes, I did.

Q What is a tag line, sir?

A A piece of line that you would attach to something to guide it.

Q Any piece of line would do?

A Well, a light piece of line, you know.

Q Did you go down below the -- let me backtrack for a minute.

This barge, did this barge have any power of its own to move through the water?

A No, it didn't.

Q It had no engine room or anything like that?

A In the crane there was an engine room.

Q It had engines to move the crane, to rotate the crane, but it had no power to move in the water?

A That's correct.

Q How would it move?

A By tugboat would ship it.

Q Did Rudolph have any tugboats?

A No, he didn't.

Q So they would have to hire tugboats?

A That's correct.

Q Somebody would have to hire a tugboat?

A That's correct.

Q Could you go down below in that vessel? Was there a below decks area?

A Well, there's hatches, and compartments in the hull.

Q Did you always use a tag line when you were doing this particular type of job?

A Yes, when I had one.

Q Do you remember back in 1972 you and I and Mr. Corcoran and a few other attorneys, and a reporter were in Mr. Corcoran's office and we took a deposition?

A I don't remember being there. I don't remember the dates. I am sure you know what you're talking about.

Q Perhaps Mr. Corcoran will be good enough to lend me a copy of the deposition.

Did there come a time when you signed the deposition?

A I don't remember, sir.

Q I don't have a signed copy.

MR. BROWNE: Mr. Corcoran, is the deposition signed?

MR. CORCORAN: I really don't know.

MR. BROWNE: Apparently someone sent the original to you.

MR. CAMPBELL: It has been signed.

BY MR. BROWNE:

Q Let me turn to Page 18, if I may. I would like to start reading, I am not going to read, I am going to ask you questions, and I am going to read you questions and answers and ask you if you remember being asked these questions and giving these answers:

"Question: How do you guide it?

"Answer: At this particular time I was guiding it with my hand.

"Question: How do you guide it at other times?

"Answer: At other times, sometimes I'll put a line on it.

"Question; You didn't put a line on it this time?

"Answer: Not in this particular case.

"Question: Why not?

"Answer: Because this guy Chuck was hollering and screaming and ranting and raving and I was rushing.

"Question: And when you are not rushing you put a line on it?

"Answer: Yes.

"Question: How long does it take to put a line on it?

"Answer: Well, you have to, you know, go under the deck and get a line, you know, and put it on."

Do you remember those questions and giving those answers?

A Yes, I remember something to that order.

Q What?

A Yes, I remember that.

Q Was it true that lines were customarily kept under the deck?

A Not under the deck, no.

Q Well, what did you mean when you said, well, you have to go, you know, under the deck, get a line, you know, put it on?

A I think what it said was onto the deck.

Q I'm sorry, onto the deck, you didn't mean under the deck?

A No.

MR. BROWNE: Do you have a signed copy, Mr. Campbell?

Q Let me show you your signature on this deposition, Mr. McSweeney, and ask you if you did sign that before a notary public (handing)?

A Yes, that's my signature.

Q Yes. And who asked you to sign it? Did I come give it you to sign?

A I don't remember.

Q Do you remember if your attorney gave it to you to sign?

A I really don't remember, sir.

Q Well, do you know the name of the notary public who notarized it?

A It says right here, William Corcoran.

Q Does that refresh your recollection in any way as to how you came to sign it?

MR. CORCORAN: We will concede, your Honor --

A I concede that I signed it.

Q I want to know who was there when you signed it, or who gave it to you to sign?

MR. CORCORAN: We will concede, your Honor, that I gave him the copy to sign.

Q Now, when you were given the copy were you told to read it and make sure it was correct?

A I don't remember that, either.

Q Do you remember if you did read it?

A No, I don't remember whether I did.

Q Now, your testimony is that when the reporter wrote "under" you signed it as "under" you meant "onto"; is that right, onto the deck?

A Onto the deck.

Q And this was going to be a tag line that was to guide you in lowering the block, right, to help you guide it?

A Yes.

Q It wouldn't help you lift it up or anything like that?

A No.

Q Where were you when you rigged the four-part block onto the two-part block?

A On the deck of the crane.

Q You were on the deck of the crane. But you would go onto the deck to get the line, that's where you have to go, onto the deck to get the line. What do you mean onto the deck?

A No, I would take the line off the deck and put it on the block.

Q That's what you meant when you said, well, you have to, you know, go onto the deck, get a line, you know, and put it on? That's what you meant when you said that and the reporter made a mistake and took it down as "under"?

A I don't know whether the reporter made a mistake or whether I possibly misunderstood the question. Because the hatches on the crane are sealed, so it couldn't be under the deck.

Q Then it is your testimony that nowhere on this crane, this barge, there was a piece of rope?

A Rope, lines, mooring lines.

Q I thought we agreed that any light piece of line, isn't line and rope the same thing? Isn't line the mariner's word for rope?

A That's correct. But a line can be anything from an eighth inch hawser to a quarter inch line.

Q I am not really talking about eight-inch hawsers, I am talking about rope, you know what I mean by rope. Rope that could be used for a tag line.

A No, there was none.

Q There was none at all?

A No.

Q You made a thorough search and found none at all?

A There was none on deck and none in the tool room.

Q Where?

A The tool room.

Q Where was the tool room?

A Adjacent to the cabin.

Q Adjacent to the cabinette?

A The cabin.

Q And you looked in there?

A Yes, I did.

Q When did you look in there?

A In the morning.

Q [illegible] in the morning?

A When I go in and I have to get my grease gun and oil I took a general observation of what to bring.

Q Tell me, what was in that cabin?

A There was a drum of oil, grease guns, spouts, spare parts.

Q How big was this tool room?

A This tool room? Approximately maybe seven or eight feet high by eight by eight, seven by seven.

Q Did it have shelves in it?

A Yes.

Q Did it have any cabinets or doors?

A No.

Q And you went in to look to see if there was a tag line there?

A No, I went in to get the grease gun and oil, engine oil for diesels.

Q What type of work were you going to do with these things?

A Well, certain parts of the machinery that has to be greased before it can be used, and I had to add oil to the engines.

Q Did you go into the cabin to look for that, what you needed, the grease, the oil?

A Yes.

Q The grease gun?

A That was the only place to store anything on the crane.

Q I think you testified that you were on the pier that morning when you looked at that container before your accident; is that right?

A Yes.

Q You went over to the pier and over to the container and you read what was written on the container?

A Yes, that's right.

Q Was there any rope on the pier in the vicinity of the R-5?

A No.

Q You are sure of that?

A Yes, sir.

Q Just as you are sure there was no rope in the cabin?

A That's right.

Q Did you ever go into the cabin for the specific purpose of looking to see if there was any rope there?

A No.

Q Then I asked you, you didn't put the line on it this time, and you said, not in this particular case, then I said, I think this was my question, anyway, one of us attorneys asked, why not? Answer, then you said, because this guy Chuck was hollering and screaming and ranting and raving and I was rushing.

Was your memory better when you gave me this deposition back in 1972 than it is today?

MR. CORCORAN: Objection, your Honor.

THE COURT: Overruled. You may answer.

A Was my memory better in 1972?

Q Yes. Your memory about this occurrence.

A Well, it probably -- it was fresher in my mind.

Q Your attorney was present at this deposition, wasn't he?

A Yes.

Q And you spoke to your attorney before you had the deposition, didn't you?

A Before the depositions?

Q Yes.

A I don't believe so.

Q You didn't speak to your attorney before you had the deposition?

A I mean, you know, I talked to him about the case before.

Q I am talking about the day of the deposition, or a couple of days before. Did you discuss --

A I don't remember, Mr. Browne.

Q Have you always used a tag line in this particular job of work except this one time?

A Pardon me?

Q Have you always used a tag line to do this particular type of work except for this particular occasion?

A No, I haven't always used a tag line.

Q Are they usually tag lines or something that can serve for a tag line aboard the Rudolph vessels?

A Yes.

Q What you were trying to do as this was lowered down was to guide the block; is that correct?

A That's correct.

Q Were you trying to lift the block?

A No, sir.

Q Were you trying to move it from one location to another?

A I was trying to guide it into position.

Q By that you mean you were trying to rotate it so it would be pointing correctly?

A That's correct.

Q In other words, it's got to be somewhat parallel to the pulley up at the top; is that right?

A That's right.

Q So if it was coming down like so (indicating) you might have to turn it like this (indicating)?

A That's correct.

Q Then I think you said that -- how did you describe what happened in the instant of your accident? Do you remember your testimony of this morning? What happened at the moment of your accident?

A I put my hands on the block to guide the block, and it twisted and lurched to the left pulling me over.

Q Twisted and lurched?

A And I had a knife-like pain in the back, and I fell to the ground.

Q You also said, I think, the crane wasn't operating; is that correct?

A That's correct.

Q You have operated cranes before?

A That's correct.

Q You have operated cranes since?

A That's correct.

Q You are a crane operator now?

A That's correct.

Q So the crane wasn't coming up or down?

A No, sir.

Q At the time of the accident. And the motion, whatever motion it may have had, was not an up and down motion; is that right?

A That's correct.

Q When a crane operator is lowering a load, be it a block or anything else, does he generally put the boom over where he wants to lower it and then activate the line so the load is lowered? Is that generally the way it's done?

A That's correct.

Q Is that the way it was done here?

A That's correct.

Q So then it would be very unusual if the crane were rotating at the very same time it was being lowered down, wouldn't it?

A It wouldn't be rotating.

Q In fact, was it rotating in this case?

A No, sir.

Q So then is it fair to say that if the block did lurch, you say it twisted and lurched, is it fair to say that if it did twist and lurch as far as you know it wasn't the crane operator's activity that made it twist and lurch? Is that right?

A No, you're correct in assuming that.

MR. BROWNE: Would you mark this for identificatio please?

XXX (Defendants' A marked for identification.)

Q Mr. McSweeney, if you look at the front page of that I notice the initials MM a couple of three or four places on the page. Did you make those initials, the MM's (handing)?

A Yes.

Q Do you remember when you made that statement? Or, do you remember when you signed that document?

A Yes, I think I signed this in my home. Someone came to my house.

Q Did you write this out yourself, or did someone else write it out for you?

A Someone wrote it out.

Q Did you read it?

A Yes.

Q And you put the MM's as you were reading it?

A Yes. Well, I don't know. Certain things were corrections, he wrote it wrong, and he just crossed out something. I don't know.

Q But it was satisfactory to you when you signed it; is that right?

A Yes.

Q Would you be good enough to read the paragraph, the fourth paragraph down in which the first words seem to be, "I was rigging" --

MR. CORCORAN: Just a moment. This document is not in evidence.

THE COURT: Sustained.

MR. BROWNE: I offer the document in evidence, your Honor.

MR. CORCORAN: No objection, your Honor.

THE COURT: Very good. It may be received.

XXX (Defendants' Exhibit A received in evidence.)

BY MR. BROWNE:

Q Mr. McSweeney, would you kindly read for me the paragraph to which I referred?

A It starts out with -- there are two paragraphs that start out with "I." "I was injured aboard the crane on March 14, 1970 --"

Q That's November 14, isn't it?

A November, I'm sorry.

Q Next paragraph.

A "I was rigging the lower block, and while pulling on the block -- lower block below --"

Q The words "lower block" are in parenthesis?

A "I was attempting to land the lower block in the correct position. We were going to change the block from a single -- " I can't make out this writing.

Q You can't make out the next word, "single"?

A Is that what it says, "single"?

Q You said "single"?

A Well, it appears to be single. I'm not sure. "Single part to a four part block".

Q Those are your initials, MM?

A That's correct.

Q What does the next paragraph say?

A "While pulling the block I felt my back give way and I felt the -- I fell to the dock. I remained on the dock until they placed me on a pallet and moved me inside the building awaiting the ambulance from Long Island College Hospital."

Q In Brooklyn?

A That's right.

Q Then your initials again, MM?

A Right.

Q That statement was made while you were still out of work in that four month period?

A Shortly after I was injured, I believe. I don't know when it's dated, if there is a date on it.

Q I don't think there is.

A I'm not sure. I think someone came to my house from Rudolph's office and wanted me to make a statement as to what happened.

Q Did they want to know what happened? Is that it?

A Yes.

Q And you wanted to tell them what happened, is that why you made the statement?

A Well, I had no reason not to.

Q Did you tell them about the lurching and twisting?

A I don't know. I didn't read the whole thing.

Q Why don't you read the whole thing now and answer my question, did you tell them anything about the lurching and twisting?

A Excuse me for taking so long.

Q That's quite all right. It's a very important subject, it's a very important matter.

A It's very poor handwriting. This was a week after I was injured.

What was your question, sir?

Q Did you tell whoever it was that came about the lurching and the twisting of the block?

A Did I tell them? No.

Q No. On the third page of that statement, just about the middle of the writing, there is a word that seems to be crossed out; is that correct? It is crossed out?

A Right.

Q And your initials are above that; is that right?

A Yes.

Q Was that done because you felt that the person who had written the statement had made a mistake that you wanted to correct?

A Yes.

Q And he permitted you to correct it and put your initials in; is that right?

A Yes, that's correct.

Q Was that statement made before or after you retained an attorney?

A This statement here?

Q Yes.

A I would say it was before.

Q I think you said you went to Dr. Cook a few days after this incident; is that right?

A I went to -- I went back to see Dr. Gudelisdo.

Q He sent you to see Dr. Cook?

A That's right.

Q That was a few days after?

A That's correct.

Q I think you said you got diathermy treatment from Dr. Cook; is that right?

A That's right.

Q When did Dr.Cook start the diathermy treatment?

A I don't know, Mr. Browne.

Q Excuse me.

A I really don't know.

Q Was it at the end of the first visit, before the second?

A You know it was six years ago, and I don't remember when he started the diathermy treatment.

Q When you went to Dr. Cook for the first time, what were you sent to him for?

A I had pain in the lower back, severe pain in the lower back, and I had, I don't know if I had neck pains at the time or developed them afterwards when I first went to him. I think I just had pains in the lower back.

Q When did the pain in the neck develop?

A It was after.

Q How long after?

A I have no idea.

Q Did you have any pain in your neck on the day of the accident?

A No, I didn't.

Q You said you went back to work and were put on light duty in the yard; is that correct?

A That's right.

Q Who made the decision to put you on light duty?

A Dr. Cook recommended that I only, you know, go back to work and take it very, very easily and go on light duty. If I could go on light duty, he would allow me to go back to work.

15 Q Did you tell someone at the Rudolph organization?

A Yes, I spoke to Mr. Arthur Rudolph about it.

Q And he permitted you to do light duty?

A That's correct.

A In changing the rigging. It's very difficult to handle the block that weighs a thousand pounds.

Q Well, the block was being held up by the crane, wasn't it?

A It still had to be positioned.

Q It had to be rotated?

A That's right.

Q You say that the longshoremen would ordinarily help you do that?

A Yes, that's correct, sir.

Q Would they also help you with the rigging?

A Putting the cable through the block, yes.

MR. BROWNE: I have no further questions.

CROSS-EXAMINATION

XXX BY MR. CAMPBELL:

Q Mr. McSweeney, was Mr. Rudolph on Pier 6 the mornin you had your accident?

A No, he wasn't.

Q Who was in charge of the crane? Was it you or Mr. Monsinger?

A Mr. Monsinger.

Q And he was paid more money than you were and he was the ranking man on the crane; is that right?

A That's correct.

Q Do you know if he had been on the crane the day before the accident?

A I believe he was.

Q When you got aboard the crane on that day of your accident was there cargo on the crane itself?

A Yes, there was a couple of containers on the deck, right.

Q Do you know how they got there?

A No, I don't.

Q And these were containers that are to be put aboard a freighter; is that right, sir?

A That's correct.

Q This would lead you to believe there was some activity the day before on that crane?

A Yes.

Q There came a time when you found out there was no rope on the crane itself?

A There was no what?

Q Rope.

A Are you referring to the line, Mr. Browne was referring to?

Q Yes.

A Yes.

Q You said you looked around that there was no rope for a tag line?

A Right.

Q Did you ask Mr. Monsinger where this rope, or where the rope would be kept?

A No, I didn't.

Q There came a time, sir, when you realized that you had to change from -- had to change the rig; is that right?

A That's correct, sir.

Q Did you ask Mr. Monsinger to help you change it?

A Mr. Monsinger is the operator up in the cab. You know, he can't help me land the block. He has to, you know, operate the crane.

Q So you now knew that two men couldn't do it; right, sir?

A Yes.

Q Did you ask anyone else?

A I asked Joe Chuck for help.

Q And then there came a time that Joe Chuck refused to help you; is that right, sir?

A That's right.

Q Did you then go over to the telephone and call Mr. Rudolph and ask him to send down some help?

A No, I didn't.

Q Sir, before you worked on these cranes you worked on ships before, didn't you, sir?

A Before I worked on the cranes?

Q Yes. Didn't you work as a ship repairman?

A Yes, I did.

Q So you were on ships at least 15 years before this accident; isn't that right, sir?

A I wouldn't say 15.

Q How long would you say?

A I'd have to be on the ship when I was eight years old. Maybe four years, five years.

Q Before the accident?

A No, before I came to work for Rudolph.

Q You were with Rudolph what, 9 years before the accident?

A About eight years.

Q So 9 and 4, 13 years.

A Okay.

Q So you are familiar with ships, though, is that right, sir?

A Yes.

Q And there came a time when you knew that two men couldn't do this; isn't the procedure with M. J. Rudolph to call up the office and say, we need more help down here?

A There was no one in the office at 8 o'clock in the morning.

Q By the way, sir, you knew that you were dealing with containers by the fact that Rudolph normally dealt with containers on vessels; is that right?

A Containers or heavy lifts.

Q You knew you were dealing with heavy work?

A That's correct.

Q By the way, do you knowwhat day November 14, 1970 was?

A What day it was?

Q Yes.

A It was a Saturday.

Q So you were getting overtime that day; is that right?

A That's correct.

Q Now, the 8 or 9 years that you worked for M.J. Rudolph you have changed these riggings many times, haven't you, sir?

A On cranes?

Q Yes.

A Yes.

Q That's part of the job of being on this two-man rig; is that right, sir?

A Part of the job is to -- yes, that's correct. You might say that.

Q And it's not unusual when you change the rigging, is it?

A Unusual?

Q Yes. When you are dealing with heavier --

A Usually the rig is prepared to do the job when it arrives on the job.

Q Well, if they are going to be in port more than one or two days there is a possibility you may have to change the rigging as the heavy weights come to the dock; isn't that true

A Normally it's rigged up four parts for containers. Normally it's rigged four parts for containers.

Q And it wasn't rigged four parts in this particular-

A No.

Q You knew that as soon as you got to the pier; isn't that right, sir?

A Yes.

Q Did you ask Mr. Monsinger why it wasn't rigged for four parts for containers?

A No, I didn't.

Q That rig R-5, when you got there, how big were the containers?

A I believe they were 40 foot containers.

Q Like the container you were going to deal with?

A That's correct.

Q By the way, sir, how far away was the Yamawaka Maru?

A About 75 feet.

Q 75 to a hundred feet?

A Maybe 50, 75 feet. Close.

Q When we discussed it at the deposition you said that three times 75 to a hundred feet. Is that about right?

A That's about right.

Q And you made some changes in the deposition, but you didn't make any changes as to that, as to the fact the ship was 75 to 100 feet away from where the crane was?

A That's approximately right.

Q You didn't tell anybody on the Japanese ship that you needed some help, did you, sir?

A No, I didn't.

Q In fact, in all the years you worked for M. J. Rudolph no one from the freighter comes downs and looks at the rigging on your crane?

16 A I have had port captains come aboard and ask for inspection certificates.

Q And did they help youchange the rigging, sir?

A The port captain?

Q No, I'm talking about the man -- the port captain isn't on the Japanese freighter, is he, sir? He's a member of the crew of the Japanese freighter?

A There are times -- I have spoken to port captains aboard the vessel.

Q Mr. McSweeney, the port captain is not a member of the crew of the freighter, is he, sir?

A No, I don't believe he is.

Q Well, you have been dealing with ships for almost 15 years, you know that the port captain is in the port, he has nothing to do with the ship?

A Sir, a port captain, to the best of my knowledge, is a seagoing captain, is he not? He is a captain --

THE COURT: Mr. McSweeney, just answer questions here now.

Q The port captain, sir, is distinguished from the crew, the captain and mates of the ships; is he not?

A Yes.

Q And he is comparable to the pier superintendent and the harbor master, is he not?

A I would say he is comparable to the pier superintendent.

Q So my question, sir, is in all the years that you have worked for M. J. Rudolph Corporation no one has ever come off the freighter and helped you with the rigging on the crane itself; is that a fair statement, sir?

A Yes, that's fair.

Q And they don't come off the freighter and look at the rigging to find out if it's a one part or a four part?

A Off the freighter? No, but I have had --

THE COURT: Off the freighter, no. All right.

THE WITNESS: May I go on with it?

THE COURT: No. You have answered his question.

Q And you didn't ask anybody from the bow of the freighter or the stern of the freighter or wherever to come down and help you at this particular time?

A No.

Q The only one you asked for help was not M. J. Rudolph your employer, it was not the steamship company, it wasn't the port captain, was it, sir?

A No.

Q The only one you asked for help was Joe Chuck?

A The pier superintendent.

Q Who was not employed by Yamashita; is that correct, sir?

A That's right.

Q Who is he employed by?

A ITO.

Q Sir, is it your testimony that changing this block is more than a two-man operation?

A Yes, it is.

Q How many man operation is it?

A Three to four men.

Q So you knew when you had to change this that it was more than a two-man operation?

A That's right.

Q And you still didn't ask your employer for any help?

A My employer was not on the location of the job. The office is not open at 8 o'clock in the morning, and, no, I didn't, to answer your question.

Q And there is no place that you could have asked for help from M. J. Rudolph Corporation at 8 o'clock in the morning?

A No.

Q When you meet this problem, sir, where you can't get help from M. J. Rudolph, isn't it the custom and procedure on the waterfront to wait until there is some help sent to you?

A Well, if I would be waiting I would be holding up the whole operation.

THE COURT: No, no. That's not the question.

Read it back, please?

(Question read.)

MR. CORCORAN: Objection on the ground it is speculative, asking for a conclusion of the witness' operation of his mind, and there is no establishment and no foundation for what the custom and practice is.

THE COURT: Overruled. This is his custom and practice as an employee of Rudolph on the waterfront, I assume

MR. CAMPBELL: That's it, your Honor.

THE COURT: All right. Overruled.

THE WITNESS: Would you ask the question again? Oh, all right. Is it customary for me to in other words stand by if I couldn't get help; is that correct?

Q That's correct, sir.

A If I couldn't get help and I couldn't do the job myself, yes.

Q But you didn't do that in this case?

A No, I didn't.

Q So there were two things you knew before you starte to change that rigging, sir: One, that there wasn't a tag line on the vessel and, two, that you didn't have sufficient men to do the job?

A Well, the harbor master then said he was going to give me a job.

MR. HOCKETT: I move to strike that, your Honor.

THE COURT: Yes. Strike that.

MR. CORCORAN: I think they have opened the door, your Honor. I think that the questions are very pertinent to that answer. He has now asked him about this very particular question.

THE COURT: Yes, but you tell me that when it came down to it there was no help offered to him from any source. Isn't that what you said to me?

MR. CORCORAN: No, we said just the opposite, that the harbor master had made the offer of help when Joe Chuck declined and cursed him out.

THE COURT: No. No. It was withdrawn. The offer of help was withdrawn before this operation started, as I understand it.

MR. CORCORAN: No. No. He just didn't help. It wasn't any formal withdrawal.

MR. HOCKETT: Your Honor, I think we are playing around with semantics. Whether or not an offer of help was made it boils down to at the time he is attempting to change the block and he did not in fact get any assistance from anybody.

THE COURT: He knew there was no assistance available.

MR. HOCKETT: There was no one there to do it.

THE COURT: Is that right?

THE WITNESS: No, your Honor. The harbor master had said that he would help me change the block.

THE COURT: Yes, but at the time you were doing this motion to steer the block into a proper position was anybody assisting you?

THE WITNESS: He was not helping me. Where he was I don't know. He might have been standing behind me.

THE COURT: He wasn't helping at this point. All right, go ahead.

THE WITNESS: But he had promised to help me.

THE COURT: All right. We understand that.

BY MR. CAMPBELL:

Q So when you were aware of these two deficiencies, the fact that there weren't enough men to do this, and the fact that you did not have a tag line, wasn't it more prudent to wait and call either the office or Mr. Rudolph and find out where the tag line was, and where the help was?

MR. CORCORAN: I object, your Honor, because he is leaving out a very important phase of the operation. That Joe Chuck was pressing him to get the job done, and because all these men were standing idle. Let him include that in the question.

MR. HOCKETT: I move to strike counsel's remarks.

THE COURT: The objection is overruled. You may answer.

MR. CORCORAN: Excuse me, your Honor. I again make an objection on the ground there is no foundation of what constitutes prudence so far as his question is concerned. There is no standard. What is the standard? Let him say what the standard of prudence is. It's a very unfair question.

THE COURT: Well, let's see if the witness understands it. Let's read it back, please.

(Question read.)

THE COURT: Do you understand that question, Mr. McSweeney?

THE WITNESS: I understand it, but by the same token I had someone say that they were going to help me, so it's a very difficult question.

THE COURT: Then if you understand the question, would you answer it.

MR. CORCORAN: Well, may my objection be noted?

THE COURT: Your objection is noted.

THE WITNESS: I'm lost again. Will you please read that again?

MR. CORCORAN: Your Honor, I must press my objection. It's like asking a man, have you stopped beating your wife.

THE COURT: Now, it isn't like that at all. Overruled.

(Question read.)

THE WITNESS: Mr. Rudolph wouldn't know where the tag line was.

BY MR. CAMPBELL:

Q He wouldn't know where the tag line was?

A No, he wouldn't know where the tag line was. Mr. Rudolph wouldn't know where the tag line is.

Q Well, wouldn't Mr. Monsinger know where the tag line was?

A I don't know if Mr. Monsinger knew where the tag line was.

Q You didn't ask him though, did you?

A No, I didn't.

Q Well, who would have known where the tag line is?

A I don't know. I don't know if the crane had a regular crew aboard it.

Q You don't know if it had a regular --

A Crew aboard it.

Q Wasn't the tag line necessary to change the rigging sir?

A Well, let me -- Mr. Monsinger was actually the engineer off of the R-6, and I was the oiler on the R-6, and to the best of my knowledge there was no crew on the R-5. There was no regular crew.

Q Well, did Mr. Monsinger work with you the day before on the R-6?

A No, he didn't. He worked, I believe, the day befor on the R-5, only for that day, or the day before that.

Q Can we establish this, sir, that the tag line was necessary for changing the rigging on the R-5 on the day that you had your accident?

MR. CORCORAN: I submit, your Honor, that this question is improper when the witness has repeatedly stated that there was no tag line.

THE COURT: No, I think this man is in as good a position as anybody in the world to tell us whether he regarded the tag line as a necessary piece of equipment to do this job properly.

MR. CORCORAN: Yes, assuming that it could be found, and assuming further he didn't have the pier superintendent --

THE COURT: And the next question is, what steps would he take if and when he found it was not available to him. No, you may have an answer to that question. The objection is overruled.

A Working shorthanded you should have a tag line. If you have enough help to --

MR. BROWNE: Objection, your Honor. I move to strike as not responsive.

THE COURT: No, I will permit it to stand. If you are by yourself you should have a tag line; is that what you are saying?

THE WITNESS: Yes. And if you have more men available to help you position this block, then you know it lessens the need for --

THE COURT: If you are asked to do something and you don't have the equipment for it, what is your attitude toward the task that is requested of you?

THE WITNESS: Well, I am going to try, your Honor, you know, I am there to do a job, I have to try to do it. He told me to change the block, and I have to try and change the block. I have to take orders from the pier superintendent

BY MR. CAMPBELL:

Q Even though it would be unsafe to do it that way?

MR. CORCORAN: Objection.

MR. HOCKETT: I move to strike that, your Honor. Taking orders from the pier superintendent.

THE COURT: Well, you may examine on that issue.

Q Even though it would be unsafe to do it in that manner, sir?

MR. CORCORAN: Objection, your Honor.

THE COURT: Let's establish whether he would so regard it. Let's make sure the witness regards it as unsafe if it's done in that manner.

Q Is it unsafe to do it with less than the required number of men, sir?

A It's taking a chance. It's taking a chance. I mean, you are trying to handle a thousand pounds and you're trying to move it in place and you know it's dangerous, yes.

Q And you knew at sometime that the person who, be that whoever it was, Joe the harbor master, whomever was not going to help you.

A No, he was going to help me.

Q But then there came a time --

THE COURT: But he wasn't in evidence helping you, I think that's what you said.

THE WITNESS: Your Honor, he said he would help me and I proceeded to go ahead about doing my job, and I put my hands on this block, and within an instant I was injured. I was lying on the ground. I don't know if the man was walking behind me or if he was going to attempt to help me. He said he was going to help me, that's all I know.

THE COURT: What did you ask him to do?

THE WITNESS: He had volunteered to help me.

THE COURT: But what did you ask him -- did you ask him to do anything when this block was coming down, this thousand pound block? Did you say, stand over here and do this, help me with this movement, push it this way?

THE WITNESS: No. He volunteered to help me, your Honor

THE COURT: All right. When this thing was coming down he was behind you somewhere and you didn't even see him?

THE WITNESS: I assumed he was behind me.

THE COURT: In any event you didn't see him.

THE WITNESS: I didn't see him.

THE COURT: And you didn't ask him to do anything?

THE WITNESS: No.

BY MR. CAMPBELL:

Q What was he to do behind you? How was he to help you?

A Well, he was going to help me change the block, and I assumed that he would follow, you know, me, and assist me in doing what I was doing.

Q Did he ever help you to change a block before?

A I don't remember. I don't remember if he did.

MR. CAMPBELL: Nothing further.

XXX CROSS-EXAMINATION

BY MR. HOCKETT:

Q Mr. McSweeney, as you started to handle this block as it was coming down and after it came to a stop and thereafter you were trying to position it, and at that point that's when you injured your back, is that right, when you were trying to position this block?

A Yes.

Q You began all this before Joe the harbor master was around to your knowledge; is that right?

A No, he was there right off the bat in the morning.

Q I'm sorry, yes, he was on the pier, right.

A Yes.

Q But at the time you were doing this positioning of the block you didn't know where Joe the harbor master was?

A When I started to walk, you know, go over and put my handson the block to position it, he was alongside of me, and whether -- and after that I don't remember, you know, where he was. I didn't see him.

Q But then something happened and he wasn't there at all; is that right?

A Well, he probably was standing behind me.

Q Without tag lines -- and you say youhad no tag lines on this occasion; is that right?

A Yes.

Q Without tag lines how many individuals are needed to steady this block as it's coming down?

A Well, you know, one or two men.

Q One man to do this?

A One or two additional men.

Q One or two additional men. Okay.

A Naturally the more men the easier it is.

Q In any event, when you injured your back you were doing this steadying by yourself; is that right?

A That's correct.

Q Who else was in the immediate vicinity of this block and yourself when you had your accident?

A There were some men, I believe, and I believe Joe was in the area.

Q Joe Chuck?

A Yes.

Q Was he within a few feet of you at the time you had your accident?

A I don't remember.

Q Didn't you testify on direct examination that you did not know where Joe the harbor master was when you were injured, that he was in parts unknown at the point that you were injured?

A I did not see him when I was injured.

Q You just told me that he was within a few feet of you?

A Well, we were standing alongside of one another. He had volunteered to help me, and I walked over to grab hold of the block. Now, for all I know he could have went in the other direction, and for all I know he could have been right behind me going to assist me.

Q To your knowledge then you do not know whether he was ready and willing and able to assist you at the time that you were trying to --

A Well, he said he was going to help me. That's the only --

18 Q But then regardless of what he said you went ahead and attempted to steady this block and then you had your accident; is that right?

A Well, he wouldn't know what to do unless I started, and he would assist me.

Q Sir, you don't know whether he was there ready, willing and able to help you when you were in fact attempting to steady this block?

A I'm sure he was there ready, and willing.

Q Well, you don't know that, do you?

A Only that he told me that he was going to help me.

Q You just know that from what he told you?

A That's right.

Q But you don't know yourself whether he was physically present at or near you at the time that this block was being steadied?

MR. CORCORAN: I submit, your Honor, that's argumentative.

THE COURT: I submit it has been answered several times before.

Q Was Joe Chuck yelling and screaming at you at the time you were trying to steady this block?

A Yes, he was.

Q Was he within a few feet of you yelling and screaming to you, or some distance away?

A No, he was in the general --

Q But in the general area, he was still continuing to use abusive language; is that what you are saying, sir?

A Yes.

Q And at what time did you inform Joe Chuck that this block would have to be changed to a four part block?

A Shortly after eight o'clock.

Q What time did your accident happen?

A Somewhere around 8:30, in that general area.

Q So is it your testimony then for about 45 minutes

Joe Chuck was running around yelling and screaming and using abusive language?

A Shortly before 8 o'clock, and about 8 o'clock I was injured.

Q Well, for onwards of 20 minutes or more he was hurling abuse at you; is that your testimony?

A Yes.

Q After you told him about the fact that the block had to be changed he was within the immediate vicinity of this string piece; is that right?

A That's right.

Q At the time you had this accident this particular crane barge was not your regular barge; is that correct?

A That's right.

Q And you were a crew on number 5, did you say?

A Number 6.

Q And this was number 5?

A That's correct.

Q And your partner, Mr. Monsinger, was also usually assigned to number 5?

A Number 6.

Q Six also; is that right?

A That's right.

Q You don't know who the regular crew on this --

A I don't believe there was a crew.

Q Are most of these barges equipped with tag lines?

A I have one aboard mine.

Q How about any of the others that you have ever worked on?

A Yes.

Q But this one did not?

A No.

Q If you did have a tag line how many individuals would be necessary to load this block?

A Well, I could stand at a distance, I wouldn't have to be near the block.

Q One person could do it? Two people?

A One person could land the block. The operator might have to pick it up and land it several times, but I would be a safe enough distance.

Q If I understand you correctly, with a tag line you yourself could have accomplished the landing of the block?

A I think so.

Q Alone?

A I think so.

Q But without the tag line you would need additional help; is that correct?

A Yes. Unless I, you know --

Q By the way, you are paid whether you stand by or are actively on the job; isn't that so?

A I'm paid?

Q Yes. Regardless of whether you are standing by or because of the weather, or because of -- whether you are actively engaged in working --

A Yes, I'm paid by the hours.

Q Is that right?

A I'm paid by the hour, that's correct.

Q And to your knowledge is the same true with longshoremen?

MR. CORCORAN: Objection, your Honor. That's not an issue in this trial. It has no relevancy.

THE COURT: Yes, I will sustain that.

Q Do you know, sir, what caused this block to twist and lurch?

A The cable must have twisted.

Q Well, do you know how it twisted?

A No, I don't.

Q This is a common occurrence?

A Not normally, no.

Q But is it one of the hazards to expect when lowerin a block --

THE COURT: You think a cable must have twisted?

THE WITNESS: Yes, your Honor.

THE COURT: What do you mean by a cable must have twisted?

THE WITNESS: The cable might have a twist in it and caused this block to pull to the left and lurch forward. Twist and lurch.

THE COURT: How would that happen? Have you ever had that happen before?

THE WITNESS: The cable has turns in it, yes.

THE COURT: Have you ever had that happen before?

THE WITNESS: I have never had it happen to me, but I have seen it happen.

BY MR. HOCKETT:

Q But this doesn't happen very often to your knowledg

MR. CORCORAN: Objection. We are not going into a-

THE COURT: No, we are exploring the instrument. Overruled.

Q This twisting that you described, it doesn't happen too often, does it?

A Well, no, but it can happen. I have seen it happen.

Q In the 8 years you worked with Rudolph before this accident it never happened to you, did it?

A Never happened to me.

MR. CORCORAN: Objection.

THE COURT: Overruled.

Q And it is your testimony by reason of its twisting around such as it did that was what caused your back to get twisted; is that right?

A It caused the block to twist.

Q Yes. Changing a block is a fairly routine procedure, that's part of your job, is it not?

A Yes.

Q You have done it many times?

A Yes.

Q And you have done it many times in the morning before the start of loading operations?

A Not usually.

Q When do you usually do it?

A In the yard before the crane goes on the job.

Q It's done before it's ever brought to the job site; is that right?

A Yes.

Q Who does it in the yard, sir?

A The fireman or the oiler, the engineer and the yard man.

Q And this is in Rudolph?

A Yes.

Q And it's Rudolph employees who do it?

A Yes.

Q Then it's brought to the work site with a proper block on it?

A Yes.

Q And it's not customarily or usually done at the pier or at the work site; is that correct?

A On occasions it is.

Q But it is uncommon?

A Uncommon, yes.

Q Mr. Browne asked you about a signed statement, and I believe it is Defendants' Exhibit A. You have it right there in front of you. Anywhere in the three pages or so do you mention Joe Chuck and his conduct and language to you on the day of this accident?

MR. CORCORAN: Objection, your Honor. I think the statement which is in evidence speaks for itself.

THE COURT: Well, why don't --

MR. HOCKETT: Withdrawn.

Q Did you ever mention to the person who asked you questions at your home shortly after this accident, did you mention Joe Chuck to him and explain that he was using abusive language at the time and date that you were injured?

A No, I don't believe so.

Q Do you mention anywhere in the contents of this --

MR. HOCKETT: Strike it.

Q Did the individual who went to your home and asked you questions, did you tell him about Joe the harbor master?

A No, I didn't.

Q And you did indicate that you retained counsel sometime after you made this statement; isn't that so?

A Yes.

Q On the date of this accident your immediate employer was one of the Rudolphs?

A Yes.

Q And he paid you? He paid your wages; right?

A Yes.

Q And he would give orders as to where to be on each day, what job to cover?

A That's right.

Q Sir, when you do go on a job as an oiler do you oil or maintain the machinery for the crane?

A That's correct.

Q And the operator operates the crane; correct?

A Correct.

Q During the course of the day when the crane operator is operating the crane, what would you do?

A Well, I would handle the lines, tighten lines.

Q This is on the barge?

A Yes. You know.

Q You act in effect as a crewman for the barge?

A Like a deck hand.

Q Yes. Deck hand. And in the course of doing this who gives you orders, if anyone, concerning what to do aboard the barge?

A Well, usually if we go to a pier we are working at a pier, we usually take orders from the superintendent.

Q Does the superintendent tell you to lighten the lines aboard the barge, and so forth?

A Yes, he'll come up and tell me that we have to move to another hatch, or move from one hatch to two hatch.

Q So on occasion during the day you have to move the barge; is that what you are saying? From one location toanother.

A From one hatch to another. From the ship to the bulkhead and back.

Q So the superintendent tells you to move the barge, to move to another location?

A Yes.

Q Does he tell you how to move it? Does he tell you in what method or manner to move it, or does he just simply tell you to move it?

A He'll tell you to move it, or he'll tell you he's going to have some tugboat do it, or he might ask you if you can pull yourself to another hatch by pulling on the line.

Q And you actually do that job, that's your job?

A Yes.

THE COURT: Mr. Hockett, are you going to be much longer?

MR. HOCKETT: No, I'm now done, your Honor.

THE COURT: All right. We will stand in recess until 10 in the morning.

MR. BROWNE: Your Honor, I have a few more moments I don't care if it's tonight or tomorrow.

THE COURT: All right. We will recess until 10 o'clock in the morning.

Ladies and gentlemen, keep an open mind. Do not discuss the case with anyone else.

(Court adjourned.)

(Time noted 3:30 p. m.)

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Michael McSweeney,

-vs- 72 Civ. 1782

M.J. Rudolph Co., Inc., et al.

New York, New York
March 19, 1976

B20 (In open court - jury not present)

THE COURT: May the record show that off the record I advised counsel that Juror No.4, overnight, had recalled that she has a daughter that works as a file clerk for some steamship company. I brought that to the attention of counsel and counsel seem to feel that that was of no consequence to proceeding with her.

On the other hand, Mr. Corcoran would like to inquire of her as to whether or not she knows which company the daughter works for and whether or not it is the defendant in this case, and has requested that we interrogate the juror in the robing room, so we shall do it.

MR. CAMPBELL: Your Honor, I mentioned it before, the defendant is not in New York City, it is a Japanese corporation. I have no objection to Mr. Corcoran --

THE COURT: All right.

MR. CORCORAN: They have agents here, though.

THE COURT: Gentlemen, come into the robing room.

(In the robing room - Juror No.4 present.)

THE COURT: I understand you have had a recollection overnight that your daughter works for a steamship company.

JUROR NO.4: Yes, it's Ship Owners Insurance is the name of the company.

THE COURT: Now, does that make any difference?

JUROR NO.4: She is a file clerk. I can't see that it does. There's nothing to discuss with a file clerk.

THE COURT: Do you have any further questions you would like to ask?

MR. CORCORAN: What is your name?

JUROR NO.4: Mrs. Neufer.

MR. CORCORAN: Would the fact that your daughter is employed by some steamship comany as a file clerk, would that influence your judgment?

JUROR NO.4: Absolutely not.

MR. CORCORAN: I am satisfied, your Honor.

THE COURT: Thank you very much.

(In open court - jurors present.)

THE COURT: I am sorry to hold you, ladies and gentlemen. I had a matter in an entirely unrelated case where I had to hear some applications of lawyers. That is why we are a little late in starting.

All right, Mr. McSweeney, you were on the stand.

MR. CORCORAN: If your Honor please, I have at this time in the courtroom a doctor --

THE COURT: And you would like to take him out of turn?

MR. CORCORAN: I would ask your Honor for that permission.

THE COURT: Is there any objection to that?

MR. HOCKETT: No, your Honor.

MR. BROWNE: No, sir.

MR. CAMPBELL: No objection, your Honor.

THE COURT: Very good. Doctor, please come up.

JOHN R. GUDELISDO, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Doctor, you are a physician and surgeon duly licensed to practice in the State of New Jersey?

A Yes, I am.

Q Are you licensed to practice in any other state?

A In New York and Missouri.

Q Will you tell us please your educational medical background.

A I was graduated from the Chicago College of Osteopathic Medicine in 1964, interned at the Chicago Osteopathic Hospital, 1964 to 1965, and went into practice in New Jersey in 1965.

Q Do you hold any other certifications?

A I am certified in general practice by the American College of Osteopathic General Practitioners.

Q Do you have certification in internal medicine?

A No, I do not.

Q Where is your office at the present time?

A At the present time, it's 322 Park Avenue, Scotch Plains.

Q In November 14, 1970, did you have occasion to visit the plaintiff, Mr.Michael McSweeney?

A Yes, I did.

Q Where did you visit him?

A I saw him at his home.

Q When you visited him at his home, tell us, please where Mr. McSweeney was.

A He was lying on the floor of his living room.

Q Would you please tell us what complaints Mr. McSweeney gave you?

A He was complaining of severe low back pain and was unable to get off the floor.

Q Did he appear to be in pain?

A Yes, he did.

Q Did you examine him, Doctor?

A Yes, I did.

Q As a result of that examination, do you have an opinion as to what he had suffered?

A At the time I felt he had an acute lumbo sacral strain and sprain and possibility of herniated disc.

Q Did he give you a history of an accident which had occurred earlier that day?

A Yes. He mentioned he was injured at work and that he was taken to a hospital in Long Island for X-rays.

Q Did he tell you that he had been taking a block off a boom --

THE COURT: No, no. Sustained. Sustained. Let's not lead here, please.

Q Did he go into any detail, Doctor, as to how the accident occurred?

A I don't remember.

Q Was it possible at the time that he was lying on the floor to fully interview him?

THE COURT: Sustained.

Q Now, Doctor, what was the nature of the examination that you conducted of Mr. McSweeney while he was lying on the floor?

A I palpated his back as well as I could, and found areas of tenderness, muscle spasm, and I did a straight leg raising test, checking for herniated disc, and it was positive on the right side.

Q Is the straight leg raising, is that one of the signs that you doctors look for to determine any damage to the disc?

A It's one of the tests used to evaluate whether there is any pressure on the sciatic nerve.

Q You mentioned a disc. Will you tell this Court and jury, please, what is a disc?

A A disc is a cushion-like area between two of the vertebrae or the bones of the back, and it acts as a shock absorber for the back. It has a soft jelly center and a moderately firm cartilage around it.

Q Is this contained in some body between the two bony vertebrae?

A It's limited in its expansion by the ligaments in front and behind.

Q But it is contained in a certain body?

A Yes, it is between the vertebrae.

Q Did you give him any medication, Doctor?

A At the time, since he was in severe pain, I gave him an injection of demerol. I gave his wife prescriptions for muscle relaxent, and Emporin, and codeine for the pain and instructed her how to use hot wet packs.

Q When you left, Doctor, was Mr. McSweeney still on the floor?

A He was still on the floor and still in pain.

Q Did you make an appointment for Mr. McSweeney to see you again?

A I told him to see me in several days, and he did make an appointment for the 17th.

Q Did he then come to your office?

A He did.

Q By the way, Doctor, where was your office at that time?

A 2314 South Avenue, Scotch Plains.

Q Was that part of some group that you worked at?

A I was working for another doctor in his building.

Q What was the name of that group?

A Interboro Medical Center.

B21 Q Doctor, on this second visit, this was in your office at the Interboro Medical Center?

A Yes, sir.

Q Tell us, please, what --

A At that time his reflexes were again checked and found to be intact, but there was still the increased amount of muscle tension and I was unable to manipulate him at that time and he was referred to the Westfield Orthopedic Group.

Q You mentioned that you had made a diagnosis of what --

MR. BROWNE: Objection, your Honor.

THE COURT: On what ground?

MR. BROWNE: I don't think he said he made a diagnosis.

THE COURT: He did a little earlier, the first day.

MR. BROWNE: No, he said the straight leg raising is one of the tests.

THE COURT: He said he diagnosed acute lumbo sacaral sprain with a possibility of herniated disc.

MR. BROWNE: I'm sorry, your Honor.

THE COURT: I remember that.

Q Doctor, you mentioned the word sprain. Would you tell us what that means to you, as a doctor?

A A sprain is a tearing of muscles and ligaments occurring after the muscle or ligament has been stretched to its utmost.

Q Doctor, that tearing of the muscles, would that cause the disc to protrude, is there a protrusion when that happens?

A Not necessarily.

Q What occurs when a disc is herniated?

A The central soft portion in most cases will protrude toward the front of the body and impinge on the spinal cord, or the nerve root.

Q Is that impinging on the spinal cord or the nerve root, is that what causes this severe pain?

A I would say most of the pain is from the severe muscle spasm.

Q What is meant by a muscle spasm?

A The muscle is in a highly tightened state and cannot be relieved by normal muscle relaxation.

Q You said on the second visit to your office you examined him and you gave him an injection, too, at that time?

A No. At the second visit I referred him to the Westfield Orthopedic Group feeling that it was a little more than manipulation or muscle relaxents to take care of it.

Q When you referred him to the Westfield Orthopedic Group, was that to Dr. Cook of that office?

A I didn't specify any particular doctor.

Q Did you later learn, however, that he came under the care of Dr. Cook of the Westfield Orthopedic Group?

A Yes, I did.

Q Did you thereafter, at any time, see him in connection with this occurrence that you first --

A No, I didn't.

Q Now, assume, Doctor, that Mr. McSweeney, on November 14, 1970, while changing a heavy steel metal block of the vessel R-5 on which he was employed, which metal block was suspended from the boom about five or six feet above the deck of the pier on which he was standing, that he put his hands on this block to guide it, when suddenly it twisted and lurched forward causing Mr. McSweeney to twist his lower back; can you, with reasonable medical certainty, say that this twisting and lurching of the block while Mr. McSweeney was holding it was the competent producing cause of the injuries which you found upon examination?

A In my opinion it could be, yes.

Q And was it?

A Yes.

Q Now, Doctor, did you charge Mr. McSweeney for your services?

A Yes, I did.

Q Was that in the sum of $25?

A Yes, it was.

Q Is that fair and reasonable?

A I think so, yes.

MR. CORCORAN: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. BROWNE:

Q Doctor, I would just like to learn the mechanism of injury. Is that the term that you use for what causes an injury, mechanism of injury?

A That's true.

Q Is it possible, Doctor, you didn't decide that he did have a disc problem, or did you decide?

A In my opinion he did have a disc problem. It hasn't been proven, though.

Q But you didn't do the tests that would be necessary to determine whether it was a disc, did you?

A No, he has never had the tests.

Q What tests would be used to find out whether he has a disc problem?

A The most specific test would be a myelo gram.

Q Are there other tests?

A Not with any accuracy.

Q Do people get discs, Doctor, without having accidents?

A No, there has to be trauma.

Q Dr. Cook, do you know Dr. Cook?

A I know of Dr. Cook to speak to him on the phone. I have never met him myself.

Q Do you know his reputation in the community?

A He has an excellent reputation.

Q What is his field?

A Orthopedics.

Q Would you tell the jury what that is?

A Orthopedics is the surgical specialty involving bones, ligaments, joints and muscles.

Q I met Dr. Cook a couple of days ago when we took his deposition, Doctor.

MR. BROWNE: Mr. Corcoran, would you give the Court one of the copies of the deposition, please? I'm looking at page 71, at the bottom of the page.

MR. CORCORAN: What page?

MR. BROWNE: Page 71.

Q I asked the doctor a couple of questions, and I am going to read the questions and answers to you and ask you if you agree with Dr. Cook.

"Q Doctor, do you often get disc problems without accidents?

"A Yes.

"Q Is it true then that a normal, healthy person can have a disc problem even though you find no abnormality, and even though he had no accidents; is that possible?

"A Yes, sir, it is possible.

"Q Is it a rarity, would you say, as disc cases go?

"A No."

Do you disagree with Dr. Cook's testimony?

A In my experience, which is limited, and I have not specialized in orthopedics, I do disagree. There is nothing in medicine that is absolute, so it is possible, but to my opinion it would be rare.

Q Supposing I bend down, somehow I did something wrong getting up, could I --

A It's possible, and that is trauma.

Q What?

A That is trauma.

Q I see. But you wouldn't call it an accident, though, would you?

A Yes, I would.

Q You would call that an accident even though the briefcase was empty and it might happen just because of the way I did it instead of doing it the way --

MR. BROWNE: All right, thank you. I have no further questions.

MR. CAMPBELL: I have no questions, your Honor.

MR. HOCKETT: No questions, your Honor.

THE COURT: Is there any redirect?

MR. CORCORAN: No, your Honor.

THE COURT: Thank you very much, Doctor.

(Witness excused.)

MR. CORCORAN: If your Honor please, was there an answer to the last question?

THE COURT: I think the answer was, yes. I saw a nodding of the head.

MR. CORCORAN: Yes, I saw the nodding, too, but I didn't hear the voice.

THE COURT: Very good.

Mr. McSweeney.

MICHAEL MC SWEENEY, resumed.

REDIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. McSweeney, on July 24, 1973, were you examined by a Dr. Howard Balanzweig at 667 Madison Avenue?

A Yes, sir.

B22 MR. BROWNE: Objection, your Honor, not proper redirect.

THE COURT: What issue does this bear upon?

MR. CORCORAN: I want the record to show that he was examined on behalf of the defendants.

THE COURT: What issue does this bear on? I understand what you are asking. What issue does it bear on?

MR. CORCORAN: It's the issue as to the opinions of the two doctors.

THE COURT: No, no, no. This gentleman was on cross-examination and redirect examination is directed to clarify something that was brought out on cross. Now, what was brought out on cross as to which this bears? What questions did any of counsel ask to which this is directed?

MR. CORCORAN: Well, if your Honor please, I inadvertently --

MR. BROWNE: Your Honor, may we do this in the robing room?

THE COURT: No, I'm going to sustain the objection.

MR. CORCORAN: Well, if your Honor please, on the question will counsel tell us --

MR. BROWNE: Your Honor, may we do this in the robing room, please?

THE COURT: If you want to have a conference of this kind we can do it in the robing room, or at the side bar. Do you feel you wish to do that?

MR. CORCORAN: Well, I would like to have, for the record --

THE COURT: All right, let's go into the robing room.

(In the robing room.)

MR. BROWNE: Your Honor, Dr. Balanzweig --

MR. CORCORAN: Well, your Honor, may I make a --

MR. BROWNE: Dr. Balanzweig examined on behalf of my client, and he came up with no findings, but he came up with --

THE COURT: Well, the burden is not on you here to speak, Mr. Browne. I want to find out what Mr. Corcoran is asking this question for.

MR. CORCORAN: Your Honor, the reason why I had asked the question was that I had inadvertently neglected to ask the witness, Mr. McSweeney, on direct to the effect that on July 24, 1973, on behalf of the defendants Rudolph, he was examined by a Dr. Howard Balanzweig at 667 Madison Avenue, New York, and that on October 26, 1973, he was examined by Dr. Joseph Moldaver at 140 East 54th Street, and reports by these doctors, in accordance with the medical exchange rule, was given to me, and it is in that connection that I am asking if these examinations took place, to clear up any differences of opinion referrable to the findings made by these several doctors as compared with the findings which the Dr. Gudelisdo, or Dr. Cook whose testimony will be presented presently.

THE COURT: Well, let me ask this: You can't, through this witness, get these doctors' reports in, so therefore what relevance is it --

MR.CORCORAN: It would have this relevancy, your Honor. Inasmuch as these doctors examined the plaintif and inasmuch as there is a contention that the injuries claimed were not completely confirmed by these examining doctors, there is in issue the nature of the injuries and hence, having been examined by these doctors the failure to produce them on trial could --

THE COURT: Well, let's see whether that is so.

MR. CORCORAN: The failure to produce them on trial --

THE COURT: After the defendants have completed their case.

MR. HOCKETT: You are anticipating now.

MR. CORCORAN: Excuse me. The failure to produce them on trial could draw an inference, or, an inference could be drawn.

THE COURT: That may be arguable to me after the defendants have rested, but at this point I will sustain the objection.

MR. CORCORAN: In order to argue this thing, your Honor, it has to be on the record that these doctors --

MR. BROWNE: May I say something?

THE COURT: No, there is no point in wasting time, gentlemen.

(In open court.)

BY MR. CORCORAN:

Q Mr. McSweeney, on cross-examination you were asked by counsel for defendants with respect to a certain paper, a statement that you signed.

Before this gentleman came to your home, had you received a call from him?

A Yes, I did. He called me the day before and he said that Mr. Rudolph had asked him if it would be all right to come out to my home for a short brief statement as to what happened so he would have a record of this.

Q Did you agree to that?

A Yes.

Q When this gentleman came to your home, did he ask you what you had been doing?

A He just asked me what happened.

Q Well, did he ask you what you had been doing?

A Yes, that I was changing a block.

Q That you had your hands on the block, or you were pulling it?

MR. BROWNE: Your Honor, I object.

THE COURT: No, no. Let's ask him what was said.

Q Well, what did he ask you?

A He wanted to know what I was doing, and I told him, in my own words, you know, very briefly what I was doing. He wrote it down. There was a few things, I was in a lot of pain, and he wrote something about I had some pain, and I remember crossing that out because that wasn't, you know, exactly, you know, the truth. And that was about it.

Q Did he, at any time, ask you if the block had twisted?

A No.

THE COURT: Did you tell him?

THE WITNESS: No, I didn't.

Q Did you respond to the questions that he asked you?

A Yes, I did.

Q And you didn't volunteer anything?

MR. BROWNE: Objection, your Honor.

A No.

THE COURT: Sustained, and strike out the answer.

Q Counsel has asked you referrable to this tagline that you mentioned about under the deck. What is under the deck of the R-5?

A Hatches, sealed hatches.

Q Are they ever open?

A No, they are for buoyancy, they are sealed.

Q Is there anything ever stored under there?

A No, sir.

Q Who ordered you to change the two-part block to the four-part block on November 14, 1970?

A The pier superintendent, Joe Chuck.

MR. HOCKETT: I move that that be stricken.

THE COURT: Yes, strike it out. You can examine into what the conversation is, but in terms of it being an order, that is speculation and it is objectionable. The answer is stricken.

MR. CORCORAN: May I ask him what the conversation was, or what he said?

THE COURT: You may. I thought it had already been covered.

MR.HOCKETT: Yes, I would object, your Honor, that this is improper redirect and it has been asked and answered.

THE COURT: I thought it had been asked.

MR. CORCORAN: No, your Honor. I submit that was brought out on cross.

THE COURT: All right, I will allow it. You had a conversation with Mr. Chuck about the block; is that right?

THE WITNESS: Yes, I told him that we could not pick up the container the way the crane was rigged up, and he told me to change the rigging to a four-part block so as to enable us to pick up the containers and resume our loading operation.

MR. HOCKETT: Again, I renew my objection.

Q In the years that you have been working on the waterfront on cranes, did Mr. Rudolph personally come to the job?

A No, sir, he doesn't.

Q Are you working on a job now where Mr. Rudolph has come on it?

A Very, very rarely will I see Mr.Rudolph.

Q With what frequency?

A Maybe once a month, maybe two months might go by without seeing him.

Q During the period of time that you would be working loading or unloading a vessel, who is the one that you take orders from?

A The superintendent.

Q Is that the case in all instances?

A Yes, sir.

B23 THE COURT: Strike that out. What do you mean by "orders"?

MR. CORCORAN: Excuse me, your Honor?

THE COURT: What do you mean by "orders"? I thought we went into this at some length at some point, but what do you mean by "orders"?

Q Yes, Mr. McSweeney, would you please tell us what you mean when you take orders from Mr. Chuck? What are the orders? What do they consist of?

THE COURT: No, the objection is sustained. Mr. Corcoran, you are trying to ask him about who is his superior who gives him directions who has the power to direct him to do things and who does not; right? That is what you are after?

MR.CORCORAN: Yes, sir.

THE COURT: Well, why don't you ask him who his superior is and how the pier runs, and things of that kind?

MR. CORCORAN: All right. Thank you, your Honor.

Thank you.

Q When you are working on a floating crane, who is your superior on the job, sir?

A The superintendent in charge of the job.

MR. BROWNE: Objection, your Honor. I'm not clear as to who he means.

Q Well, who do you mean in this case?

A In this case it would be the pier superintendent, Joe Chuck. If I was at another pier it would be the pier superintendent of that pier. If I was on a construction site it would be the pier superintendent of the construction site. If I was working --

THE COURT: Well, I know, but just a minute. The problem I think we have, Mr. McSweeney, is that when you say who is in charge of it there is somebody who is necessarily overseeing the loading of materials from one place to a vessel or off the vessel to another place; is that right?

THE WITNESS: That's correct.

THE COURT: But if it comes to the operation of your crane, who is running that crane?

THE WITNESS: Well, the operator is running the crane, your Honor.

THE COURT: Now, as far as the crane is concerned, he is your boss?

THE WITNESS: No, he isn't, your Honor.

THE COURT: No? Well, if he needs --

THE WITNESS: It's a two-man crew.

THE COURT: But he's in charge of you, isn't he?

THE WITNESS: No, he isn't.

THE COURT: If he needs something done, if something goes wrong with the drums down in the engine room, he tells you what to do, you don't tell him what to do; is that right?

THE WITNESS: On occasion I tell him what to do.

THE COURT: But you don't order him what to do.

THE WITNESS: And he doesn't order me what to do.

THE COURT: All right. But does the pier superintendent tell you how to do things with the drum and the engine room of your boat?

THE WITNESS: No, he doesn't.

THE COURT: All right. So he is not in charge of that operation at all?

THE WITNESS: No, he isn't, but he just --

THE COURT: All right.

THE WITNESS: Your Honor, can I --

THE COURT: Is the pier superintendent in charge of telling you how to change the wires on your block?

THE WITNESS: Your Honor, can I --

THE COURT: No, just please stick with my question.

THE WITNESS: How to change the wires?

THE COURT: Yes, how to change them.

THE WITNESS: No.

THE COURT: All right, that's all I think we are getting at here.

MR. CORCORAN: Can I ask him, does he tell him to change? Does he tell him to change from a two to a four-part block? That's the question.

THE COURT: Well, can he order you to change something from a two to a four-part block?

THE WITNESS: Of course, your Honor. That's who I'm working for.

THE COURT: Suppose the thing could be carried by a two and you didn't need a four?

THE WITNESS: That's up to his discretion, unless you know, he tells me what to do. Your Honor, the crane is hired out to somebody, if somebody didn't tell the crew what to do we wouldn't do nothing. Someone has to tell us what to do. Mr. Rudolph is not there. He hires the crane to somebody, they in turn tell us what to do, the superintendent.

THE COURT: And if the superintendent asks you to do something that is incapable of being done, do you have the right to say, Mr. Pier Superintendent, I cannot do that?

THE WITNESS: Yes.

THE COURT: All right, go ahead, Mr. Corcoran.

BY MR. CORCORAN:

Q Is the pier superintendent the person that is in charge of telling you where to load, what hatch to put the cargo in?

A Yes.

Q As a matter of fact, there is a pre-stow plan on the loading of the vessel, isn't that so?

A Yes, sir. To my knowledge there is.

MR. CORCORAN: At this time will you kindly let me have the ship's pre-stow plan?

MR. HOCKETT: I have it. It's an old copy. It's the exact same thing. I assume the ship also has a copy.

MR. CORCORAN: Mr. Hockett, does this constitute the records of the YAMAWAKA MARU?

MR. HOCKET: It does not, sir. It constitutes the records of ITO in connection with certain work being done at or near the site of this occurrence.

MR. CORCORAN: And are the records that you handed to me, do they include the stowage plan?

MR. HOCKETT: It is my understanding it does.

THE COURT: Mr. Corcoran, how does the stowage plan become relevant on this redirect?

MR. CORCORAN: Well, to show, or to demonstrate that the pier superintendent on the basis of these ITO records has the authority to tell this man where to load and unload and how to do it with respect to weights.

THE COURT: No, he has the ability, I would assume the witness will say, to say this container goes here in the vessel, this container goes there in the vessel, and that is the extent of it. I would assume.

MR. HOCKETT: I would strike the word "authority" as being prejudicial.

THE COURT: Mr. McSweeney, do I fairly characterize it that the pier superintendent tells you where the containers are to go in the vessel?

THE WITNESS: He tells you where to place the crane alongside of the vessel. He tells you what containers are to be loaded aboard the vessel.

THE COURT: And when you pick up that container he says that container goes over there; is that right?

THE WITNESS: That's right.

THE COURT: And you put it down over there, then some stevedores will turn it into place as it is being lowered?

THE WITNESS: That's correct.

THE COURT: Then you pick up another one, and he says that container goes next to the other one, or something of that sort?

THE WITNESS: That's right. He'll also tell you we are going to work lunch hour or work overtime tonight.

THE COURT: All right.

BY MR. CORCORAN:

Q In the follow-up of his Honor's questions, when the pier superintendent tells you to pick up a certain piece of cargo and the block is not sufficient to lift that weight that he is telling you, does he then tell you to change the block to lift that weight?

A Yes, sir.

MR. HOCKETT: Objection.

THE COURT: Overruled.

Q Has he done that?

A Yes, sir.

Q Is that the custom and practice in --

THE COURT: Strike that out.

MR. CORCORAN: Excuse me?

THE COURT: Strike that out. The objection is sustained.

Q Has that been your experience in the years that you have worked aboard floating vessels?

THE COURT: That is objectionable in form.

MR. CORCORAN: Excuse me, your Honor?

THE COURT: I said that is objectionable in form.

Q Well, what is your experience referrable to the authority of a pier superintendent to tell you --

MR. HOCKETT: I again object, your Honor.

Q (Continuing) to tell you what piece of cargo to lift, and if the lifting capacity of the block at that time is insufficient, what is his practice with respect to making it possible to lift that?

THE COURT: The objection is sustained as to form.

Q In answer to his Honor's questions, you said that the pier superintendent did direct you where to place the cargo in a particular hatch?

A That's right.

Q Is that right?

A That's correct.

Q Also in response to his Honor's questions he asked you can he tell you where to place a particular piece of cargo.

A That's correct.

Q Now, does this cargo have weight tags on them?

B24

A Yes, they do, and there are times when they don't.

Q If the pier superintendent tells you to pick up a piece of cargo, or a container, say, the weight of which is set on the container, and it is greater than the lifting capacity of the block that's in use, does he also tell you to change that block?

A Yes, he does.

MR. HOCKETT: Again, your Honor --

Q Did he do it on this occasion?

A Yes, he did.

THE COURT: Has he ever told you how to do the changing? That is what you --

THE WITNESS: He has told me when to change.

THE COURT: You are the one who is the one who does the changing?

THE WITNESS: Your Honor, in the past I have been in a position where we had no place to change, and he would shift the vessel, take it from the ship, bring it to the dock, in order so that it can be changed because the block could not be changed over the water if the boom is down, you are over the water. So the pier superintendent would have to make arrangements to shift the crane to the bulkhead and provide a place that you could change the block.

THE COURT: And you are the one that does the changing?

THE WITNESS: Yes.

THE COURT: That is your field. That changing is in your area. That is your job.

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: One of my many jobs.

THE COURT: One of your jobs.

BY MR. CORCORAN:

Q Mr. McSweeney, the changeover from a two to a four-part block, what type of cable is involved?

A It's a one-inch cable.

Q How long would it be in feet?

A Well, you have 80 to 100 feet of cable stretched out on the surface of the pier.

Q Is this 80 to 100 feet of cable one inch in diameter, is that manageable?

A Well, it's quite difficult to manage. It's --

MR. BROWNE: Objection, your Honor.

THE COURT: Yes. Sustained.

Q Will you tell us how it is made?

A Yes. It's a series of --

THE COURT: I don't see that this is appropriate. I don't see that it is really relevant to any issue that we have got here. You have got a question of a block five feet above the ground. What is all this on the dock?

MR. CORCORAN: I'm going to demonstrate to your Honor that a cable one inch in diameter, 80 to 100 feet in length, which is to be changed from a two-part to a four-part block cannot be done by one person. It's unmanageable. It springs. It has a lot of elasticity in it, and he has to have help and assistance.

That is the reason I was asking my questions of the witness in that regard.

THE COURT: Well, if he said so that would be cumulative, if he has already testified to that. The objection is sustained.

MR. CORCORAN: At least it would inform the jury what the problem was.

THE COURT: The objection is sustained.

Q Now, on the day prior to this accident were you working at an ITO pier?

A Yes, I was.

Q Did you change a block on that day?

MR. HOCKETT: Objection, your Honor.

THE COURT: Yes. Sustained.

MR. CORCORAN: I want to show how, if I may --

MR. HOCKETT: Your Honor, if he has comments I ask that they be done at the side bar.

MR. CORCORAN: Can I have a side bar proof on this?

THE COURT: You can put in an offer of proof in our recess. The objection is sustained.

MR. CORCORAN: I don't want to violate your Honor's ruling. May I ask him if anyone assisted him and who they were?

THE COURT: It seems to me that is repetitious.

MR. CORCORAN: No, this is not repetitious. This is an attempt to show what is actually done on the pier and who did it in the case involving an ITO pier immediately prior to this accident.

THE COURT: But didn't we hear direct proof that he said he needs another man? I think he has testified to that.

MR. CORCORAN: He can tell us with clarity who that other man was.

THE COURT: The objection is sustained. That is irrelevant.

MR. CORCORAN: In view of the circumstances, I have no other questions.

THE COURT: All right, thank you very much.

MR. BROWNE: I have just some recross-examination on just the issues that were just raised. It won't be very much, your Honor.

THE COURT: All right.

MR. BROWNE: I think, your Honor, we do now have this question that he asked the pier superintendent for help and help was forthcoming. That did come in yesterday, didn't it, to some extent?

THE COURT: It did. That is correct.

MR. BROWNE: I don't believe it was in when I cross-examined.

THE COURT: That may well be.

RECROSS-EXAMINATION

BY MR. BROWNE:

Q Going to testimony of yesterday, Mr. McSweeney, I think mostly in response to Mr. Campbell's questions, you said that the pier -- not the superintendent, the harbor master, Joe, not Joe Chuck, a different Joe, right?

A Yes.

Q Do you know Joe the harbor master's name?

A No, I don't.

Q All right. I will call him the harbor master from now on.

Did he tell you that he was going to help you do this job?

A Yes.

Q When did he tell you that?

A When Joe Chuck was hollering at me, you know, verbally abusing me, he was present and he said to me, I'll give you a hand. And Joe Chuck refused to supply any help.

Q Were you still on the pier?

A Yes.

Q In other words, you had looked at the writing, you read it, you had read what was written on the container, then you went to Joe Chuck and while you were talking to Joe Chuck the harbor master said he would help you; is that right?

A Yes, that's about right.

Q Then you went aboard the vessel to hook up the four-part block to the rigging?

A That's correct.

Q When it came time to lift the four-part block, do you know where the harbor master was?

A He was on the pier.

Q He was on the pier?

A Yes.

Q Did you see him there?

A Yes.

Q You were still on the pier when Monsinger lifted up the --

A I was on the deck.

Q You were on the deck of the ship, the barge, the crane?

A Yes.

Q And the harbor master was on the pier?

A Yes.

Q You could see him?

A Yes.

Q Did Monsinger lift these things on his own, or did you give him signals?

A I gave him a signal.

Q Did you give him signals in general on how to handle it?

A If we were changing over, yes, that's the only time I would give him signals.

Q In other words, when a man is running a crane, is it fair to say that he doesn't operate the crane at all until somebody makes a signal? Is that pretty much a general rule?

A Sometimes he runs the crane without signals.

Q What about this case, were you signaling him to raise it? You did signal to raise it, didn't you?

A To raise the block off --

Q Off the ship?

A Yes. In other words, it was hooked up and I was clear --

Q Then did you go out on the pier?

A Yes.

Q While the thing was up in the air?

A Yes.

Q And where was the harbor master when you got on the pier?

A He was on the pier.

Q Where was Chuck?

A He was on the pier.

Q And were they within your field of vision?

A Pardon me?

Q Where were they with respect to you?

A They were in my vision, yes.

Q About the same as you, myself and the judge?

A Yes, approximately.

Q Did you signal Monsinger to lower the block?

A The boom?

Q No, the block.

A Why would he lower the block?

Q The block was up in the air, way up high?

A Yes.

Q And it had come down about five feet over the ground; right?

A Yes.

Q Did you signal him to lower it to that level?

A No.

Q Did he do it himself?

A He didn't lower the block.

B25 Q I'm sorry, the block, the block did eventually come until it was five feet in the air; is that right?

A Yes.

Q It hadn't been raised up, it had just been drifted over?

A The block was raised.

Q How high was it raised?

A Ninety feet, approximately.

Q Then the boom swiveled over the pier?

A The boom, the crane rotated over the pier.

Q Then the block was lowered?

A The block was not lowered.

Q Never?

A Never.

Q Which block wasn't lowered? The four-part block?

A Neither block was lowered.

Q I'm sorry, I must have lost you somewhere. We had the block, the four-part block raised 90 feet in the air?

A Yes.

Q Off the deck of the crane?

A Right.

Q Then the crane rotated over the pier?

A Right.

Q Did there come a time when the four-part block was lowered?

A The block was not lowered, the boom was lowered.

Q Oh! The boom was lowered. I'm sorry.

The boom was lowered until the block was five feet over the pier?

THE COURT: And if the boom is lowered, the block is lowered; is that right?

THE WITNESS: That's right.

Q Did you signal Monsinger to lower the boom?

A No, I didn't.

Q Did he just do it by himself?

A He knew what he has to do.

Q Eventually it came to a stop.

A Yes.

Q Were you watching the load as it was up in the air?

A Was I watching the load? No, I was not.

Q Did you see it --

A I was standing out of the way.

Q You saw it, didn't you?

A I saw it when it came into vision.

Q Yes. Now, when it got in position where it was when you had your accident five feet over the pier, do you know where Joe, the harbor master, was?

A No, I couldnt' say for sure where he was.

Q Did you see him leave?

A No, I didn't see him leave.

Q Do you know where Joe Chuck was?

A He was in close proximity as you described before.

Q You saw that?

A Yes, as I came from the deck --

Q Were you still arguing?

A Was I still arguing? He was still hollering at me, yes.

Q Did Joe, the harbor master, ever say anything?

A All he said previous to that was that I'll give you a hand.

Q He said he would give you a hand. But after that you went on the crane, then you came back on the pier?

A Right.

Q After you went on the crane, and then after you came on the pier during that time did Joe, the harbor master, say anything to you?

A No.

Q Did he say he wouldn't help you?

A No, he didn't.

Q Did you ask him, come on, let's guide the block?

A He and volunteered to help me and --

Q Well, did you ask him? Did you ask him? The block is five feet over the ground and you are standing there and you are going to guide it. Did you say, Joe, the harbor master, come and help me guide?

A No, I didn't. I thought he was behind me.

Q No, you didn't?

A No, I didn't.

Q You thought he was right behind you?

A Yes.

Q Could he have helped you from behind?

MR. CORCORAN: Objection.

THE COURT: No, overruled.

MR. CORCORAN: The form of the question is speculative.

THE COURT: Overruled.

Q Could he have helped you from behind?

A No, he couldn't.

Q He had to go to the other side or something, didn't he?

A Well, alongside, or --

Q But you thought he was behind?

A Yes.

Q You thought he was going to help you?

A Yes.

Q You mentioned something about twists in the cable. Were part of your duties that morning, could you tell us, involved in inspecting the cables and oiling?

A No, I said greasing, oiling, and so on, and so forth. I says when I came on the rig I went in the tool room and I made a general observation, or inspection as to what was there.

Q Did you inspect the cables?

A Did I inspect the cables? No.

Q Did you look at the cables?

A No, I didn't.

Q Did you see the cables?

A All I saw was the two-part blocks.

Q You didn't see the cables that the two-part blocks were hanging on?

A No, I didn't. I didn't look at them. But I didn't inspect them to answer your question.

Q You inspected the block?

A No, I didn't inspect the block.

Q You saw the block?

A I saw the block.

Q When he lifted the four-part block off of the crane, did he do that by pulling on the cable, or did he do that by raising the boom?

A By hoisting the cable.

Q In otherwords, the drum turned, the cable tightened, it went up 90 feet; is that right?

A That's correct.

Q Did you see that happening?

A Did I see that happen? I didn't watch it, no.

Q I didn't ask you if you watched it. I asked did you see it go up 90 feet?

A No, I didn't. I saw the block -- I proceeded to go up the ladder onto the dock, I was not watching.

Q I didn't ask you if you were watching. Did you see this four-part block going up 90 feet, coming out over the pier --

A I did not see it going up 90 feet.

Q Did you see it when it was up 90 feet?

A No, I didn't.

Q Did you see it when it was swung out of the pier?

A I saw it when it swung down to the level of my vision.

Q You didn't look up at all?

A No.

Q When it came down, was it rotating?

A Was it rotating?

Q Yes. You said before it had reached the point where it was stopped, right, didn't you say that?

A That's right.

Q Was it stopped or was it turning around like this (indicating)?

A Well, it was turning, you know, to a certain --

Q How fast was it turning?

A I don't know how fast.

Q Did you wait for it to stop?

A Did I wait for it to stop?

Q Yes.

A It'll never stop.

Q It'll never stop?

A No.

Q It'll turn forever?

A It'll turn, then it'll turn back the other way.

Q Forever?

A Forever? It'll keep turning. A cable will twist and then untwist and then twist again.

Q So it was twisting. Did you ask Joe, the harbor master, to help you stop the twisting?

A No, I didn't.

Q How long did you let it twist?

A How long did I let it twist?

Q Yes. Twisting in the wind.

A It wasn't twisting in the wind.

Q What was it twisting on? How long was it twisting?

MR. CORCORAN: Your Honor, I ask that --

A I don't know how long it was twisting.

MR. CORCORAN: Your Honor, I ask that that comment of counsel be stricken.

MR. BROWNE: I'm sorry, your Honor. I do apologize, and I ask that it be stricken.

Q How long was it twisting?

A I don't remember how long it was twisting.

Q Was it twisting only one way, or twisting one way then back?

A To the best of my recollection it was twisting one way.

Q Was it twisting very fast?

A Not very fast, no.

Q I think you said the block was a thousand pounds; is that right?

A Yes.

Q How much does a two-part block weigh?

A I don't know, maybe 500 pounds.

Q The two-part block, I think, was close to the four-part block? They were close together?

A Yes.

Q So you had 1500 pounds there. You said it lurched. What happened --

A It twisted and lurched.

Q Which way?

A To the left and forward.

Q And forward. By forward, you mean away from the --

A Yes, the hook.

Q It didn't hit you?

A No, it did not hit me.

Q If Joe, the harbor master, was helping you what would he be doing?

A What would he be doing?

Q Yes.

A He would help me to land the block and help me to unreave the two-part block and reave the four-part block.

Q Well, we're not really interested. That was part of it, wasn't it, what Joe, the harbor master, was supposed to do, reaving the blocks?

A Yes, to help me land and help me reave the block.

Q And that would be after the thing was down and you have the wire and you would be casting it to him --

A I said he would help me to land.

Q Okay. Let's talk about landing the blocks. That's what we're talking about, landing the blocks.

How would he help you to land the block? You are standing here, where would he stand and what would he do to help you land the block?

B26

A He would help to land it in a proper position.

Q Where would he do that?

A He would put his hands on the block.

Q Where would he put his hands on the block?

A Alongside the block, or he would have hold of the block.

Q If the block lurched to the left and forward, what would he do about it?

A The block twisted and lurched.

Q Twisted to the left and lurched forward, I'm sorry. What would he do?

A He would have -- it could have been two men holding on to it, and the chance of this block twisting or lurching might have been lessened.

Q Have you ever made any studies of physics? How 1500-pound loads operate when they are suspended from a cable?

MR. CORCORAN: Objection, your Honor.

MR. BROWNE: Your Honor, the case rests on his opinion. I want to find out what he knows about it.

MR. CORCORAN: This witness is not an expert in physics.

MR. BROWNE: All right, fine. I have no further questions, your Honor, thank you.

MR. CAMPBELL: No questions, your Honor.

MR. HOCKETT: None, your Honor.

THE COURT: All right. Is there anything else, Mr. Corcoran?

REDIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. McSweeney, when the block was lowered, that occurred when they lowered the boom?

A That's correct.

Q So that the block came into your vision as the boom came down as well; isn't that true?

A That's correct.

Q And ultimately the boom would have rested on the deck of the pier?

A That's correct.

MR. BROWNE: Your Honor, it sounds more like a summation.

THE COURT: No. Overruled.

Q When the block came into your vision, some five or six feet above the deck of this pier on which you were standing, had the crane come to a complete stop?

A Yes.

Q There was no movement of the drums?

A No, sir.

Q No movement of the boom?

A No, sir.

Q And there was no raising or lowering of the load itself?

A No, sir.

MR. CORCORAN: All right. Thank you.

THE COURT: Thank you.

MR. CORCORAN: One further question. I will be finished, and this is my last question, your Honor.

Q When you put your hands on the block had this twisting lessened considerably at that time?

A Yes, sir.

Q Did you believe that it was safe to put your hands on it at that time?

MR. BROWNE: Objection.

THE COURT: Yes. Sustained.

MR. CORCORAN: I think he was asked some questions, your Honor, on cross-examination whether a thing was unsafe, and that was permitted, to my recollection. Now I'm asking him was it safe in his opinion. To be consistent, I think I should ask that question.

THE COURT: Well, I'm troubled by the characterizations involved in that. I assume you felt, in the course of doing your work, that was an appropriate time to put your hands on the block?

THE WITNESS: That's right.

THE COURT: All right. The objection to your question is sustained.

MR. CORCORAN: But you have asked my question, your Honor.

THE COURT: All right. Very good. Is there anything else? Is there anything else?

MR. BROWNE: No, your Honor.

MR. CAMPBELL: No, your Honor.

MR. HOCKETT: No, your Honor.

THE COURT: Mr. Corcoran, is there anything else?

MR. CORCORAN: No, your Honor.

THE COURT: Thank you. You are excused.

(Witness excused.)

MR. CORCORAN: At this time, if your Honor please, I would like to read to the jury the deposition taken of a witness, Mr. Joseph Maguilo.

MR. HOCKETT: I would object, your Honor. The witness will be here to testify on the defendants' case.

THE COURT: Let me see the deposition, please.

MR. HOCKETT: Actually, your Honor, if he wants to do it I will withdraw the objection.

THE COURT: You withdraw the objection?

MR. HOCKETT: Yes, your Honor.

THE COURT: All right.

MR. CORCORAN: At this time, if your Honor please, I am going to read the deposition of Mr. Joseph Maguilo pursuant to notice dated July 31, 1972, and said deposition was taken on the 16th of August, 1973 at 10:00a.m. before Janet B. Brown, Notary Public of the State of New York.

Present at this deposition were the following firms of attorneys: Corcoran & Brady, By William J. Corcoran of Counsel; Fogarty, Nielson & McLaughlin & Semel, attorneys for the International Terminal Operating Company, By James D. Hockett; Kirlin Campbell & Keating, attorneys for the defendant Yamashita Shinnihon Line, By Jerome R. Campbell, of Counsel; D'Amato, Costello & Shea, attorneys for the defendants M.J. Rudolph Co., Inc., and M.J. Rudolph Corp., By Richard Browne, of Counsel.

Present at the examination were Mr. Michael McSweeney and Mr. James A. Rudolph.

Mr. Maguilo was sworn and testified as follows:

"EXAMINATION BY MR. CORCORAN:

"Q Will you tell us, please, your full name?

"A Joseph Maguilo.

"Q Where do you reside?

"A --"

THE COURT: Mr. Corcoran, before you get into this, let me say to the jury that this is testimony that is taken, obviously, at another time. The witness is under oath and the lawyers are present, and it is to be received exactly as if the man were sitting here in this room and testifying at this time. You are to consider it on that basis as if he were here sitting on the stand and the questions were being put to him at this time.

MR. CORCORAN: Thank you.

THE COURT: Go ahead, sir.

MR. CORCORAN: "Question: Where do you reside?

"A 46 Prospect Street, Freeport, New York.

"Q On November 14, 1970, by whom were you employed?

"A International Operating Company.

"Q Where is the International Operating Company located?

"A 17 Battery Place.

"Q Tell us for how long a period of time have you been employed by them?

"A Twenty-one years.

"Q On November 14, 1970, in what capacity were you employed?

"A Marine superintendent.

"Q For how long had you been employed as a marine superintendent?

"A Five years.

"Q Prior to that time, Mr. Maguilo, what was your title?

"A Ship foreman.

"Q For how long were you a ship foreman?

"A Five years.

"Q Prior to being a ship foreman, what were your jobs?

"A Hatch foreman.

"Q How long were you a hatch foreman?

"A Four years.

"Q Prior to being a hatch foreman?

"A Longshoreman.

"Q How long had you been a longshoreman?

"A Several years.

"Q During all that period of time of 21 years had you been employed by the ITO?

"A The last dozen years, inclusive of ITO. Prior to that it was various stevedores.

"Q During this period of time that you were employed in the classification of a longshoreman you had worked for other stevedores, you said, in addition to ITO?

"A Yes, sir.

"Q During the time that you were classified a longshoreman, were you a member of the union?

"A Yes, sir.

"Q What was the name of the union?

"A International Longshoremans Union.

"Q How long have you been a member of the ILA?

"A From 1951 until 1962.

"Q Did you retain any affiliation with the ILA after 1962, say on withdrawal time?

"A Yes, sir.

"Q So, in effect, you are still a member of the ILA?

"A Yes, sir.

"Q So that when you were employed in these positions as hatch foreman and ship foreman and superintendent, these were in managerial jobs; is that so?

"A Correct. Superintendent.

B27 "Q Superintendent?

"A Yes.

"Q And you have to take a sort of leave of absence from the union by taking your withdrawal time; is that so?

"A Yes, sir.

"Q You know the plaintiff who is sitting here, do you not?

"A Yes, sir.

"Q I'm talking about Mr. Michael McSweeney.

"A Yes, sir.

"Q For how long a period of time would you say you know him? That is in the course of your business handling stevedores.

"A Several years.

"Q On November 14, 1970, tell us, please, where you were actually working?

"A Pier 6, Brooklyn, Port Authority.

"Q Brooklyn, Port Authority?

"A Yes.

"Q Who was the Brooklyn Port Authority?

"A Who was the Brooklyn Port Authority?

"Q Yes.

"MR. CAMPBELL: If you know.

"A We rent a pier from them.

"Q When you say we rent a pier, unquote, you mean IT

"A Yes, sir, International Operating.

"Q Is that part of the Department of Marine & Aviation?

"A No, sir.

"Q It is a separate entity, the Brooklyn Port Authority?

"A That's correct.

"Q Is it connected with the Port of New York Authority, do you know?

"A Yes, it is.

"Q Now, tell me, Mr. Maguilo, what time did you start working on November 14, 1970?

"A I'm normally down at the pier between 7:00 a.m. and 7:15.

"Q Do you have an office at the pier?

"A Yes, I do.

"Q What were your duties on November 14, 1970?

"A Our main duty is to make sure that everything is in readiness for an 8:00 o'clock start when we have gangs ordered out for that day.

"Q When you say gangs ordered out, unquote, do you mean gangs or groups of longshoremen?

"A Yes, sir.

"Q And how many gangs had you available for ITO on November 14, 1970?

"A I belive it was four.

"Q And how many men are there in a gang, approximatel

"A Twenty per gang.

"Q And you were superintendent, or in overall charge of this operation?

"A Yes, sir.

"Q Did you have working under you hatch and ship foremen?

"A Yes, sir.

"Q Are these employees of the ITO?

"A Yes, sir.

"Q On that day, who was your hatch foreman?

"A I don't know offhand.

"Q Would his name be available say, in the records of the ITO Company?

"A Oh, yes.

"Q Would you, upon the completion of this examination, please include in the space left for that purpose his name and insert his name?

"A You mean names? I said four gangs.

"Q Right. What was the name of your ship foreman? Is that the right title?

"A Ship foreman, yes.

"Q What was his name?

"A I had possibly three ship foremen in that day. Herbert Isernio, Matt Latorre and Joe Jaccaro."

MR. HOCKETT: Just as a suggestion, your Honor, I don't want to interrupt Mr. Corcoran, but a lot of this goes far afield of the issues of this lawsuit.

THE COURT: I will tell you what we are going to do. Let's take a recess at this point.

Ladies and gentlemen, we will take our mid-mornin recess. Counsel stay a minute, if you will.

(Jurors leave the courtroom.)

THE COURT: Mr. Corcoran, could you go through this deposition with a pencil and pick out those questions and answers that pertain to this case?

MR. CORCORAN: Yes, I did, your Honor, and everything I have read so far bears upon the subject of what his duties are going to be, and I say that it is pertinent to this case and it is part of my proof. I have eliminated some portions of it, but I respectfully say to this Court that my questions as to the amounts that I have read and will read are completely pertinent to the issues.

THE COURT: I just had a feeling that you were starting at page 1 and you were going to go all the way to the end of the deposition without --

MR. HOCKETT: Same thing here.

MR. CORCORAN: It may well be, your Honor.

THE COURT: And I saw no point in getting into this man's ILA background, or --

MR. CORCORAN: It sure does.

THE COURT: Or who owned the pier or that the

Brooklyn Port Authority had a connection with the New York Port Authority. That doesn't bear on our issues at all.

MR. CORCORAN: Your Honor, I must respectfully say to you as follows: That his association with the ILA is such that when he comes here he will be asked if he works hand-in-hand with the International Union of Operating Engineers and does he give the assistance of the ILA men to the Operating Engineers Union. And that's the basis for it.

MR. HOCKETT: His union affiliation, sir, has nothing to do with my client.

THE COURT: Well, you understand my suggestion to you?

MR. CORCORAN: I understand, your Honor, but I also understand that --

THE COURT: Counsel, please.

MR. CORCORAN: Excuse me, your Honor.

THE COURT: All I can say is I would trust that you would go through this deposition with that in mind and cut out anything that really is not relevant to what we are dealing with here in this litigation. So, we will take our recess.

(Recess)

(In open court - jury present.)

THE COURT: All right, Mr. Corcoran.

MR. CORCORAN: "Question: Do each of these ship foremen work on a particular vessel?

"A If there were more than one vessel, yes.

"Q On the morning of November 14, 1970, how many vessels were there at Pier 6, or in that area, where ITO was going to work?

"A In the area?

"Q Yes.

"A Of this incident?

"Q Yes.

"A One ship.

"Q What was the name of that vessel?

"A YAMAWAKA MARU.

"Q If you know, is the YAMAWAKA MARU owned by the defendant, Yamashita Shinnihon Line?

"A Yes, sir.

"Q If you recall, tell us how that vessel was tied up on the pier?

"A On the south berth over on the port side.

"Q Port side to the south berth?

"A That's right.

"Q How long was the YAMAWAKA MARU in port tied up in Pier 6-5 on November 14th, approximately?

"A Offhand, I don't know. A couple of days.

"Q How long, or how large a vessel is the YAMAWAKA MARU in tonnage or length, whatever way you want to describe it?

"A About 460 feet, and the beam is about 62.

"Q Was there any other vessel which ITO was to work on that day?

"A I don't recall.

"Q In your capacity as pier superintendent, would you briefly tell us, Mr.Maguilo, what the men employed by ITO were to do?

"A When you speak of men, you speak about the individual longshoremen?

"Q Well, number one, let's take insofar as the corporation, ITO, is concerned. What were they to do?

"A Our obligation was to load or unload the vessels.

"Q On the morning of November 14, 1970, what vessels were ITO to unload, to load or unload?

"A The YAMAWAKA MARU, we were loading.

"Q Tell us, please, what was the merchandise or material that was being loaded?

"A General cargo, unboxed automobiles, some heavy lifts, such as machinery and containers.

B28 "Q Did the ITO have a contract, or agreement of some sort with the owners of the YAMAWAKA MARU to load this vessel?

"A I believe so.

"Q And that, of course, was not being taken care of by you, but by somebody in the office; is that right?

"A That's correct.

"Q So when a vessel is to be loaded, particularly the YAMAWAKA MARU, is ITO given any sort of a plan with respect to where the cargo and other merchandise is to go?

"A Yes.

"Q What is that called?

"A A pre-stow."

At this time, if your Honor please, I would like to offer into evidence the pre-stow plan subpoenaed of the ITO, and a Xerox copy, or a printed copy that is in the possession of the Shinnihon Line.

May I have that, please?

MR. CAMPBELL: The defendant Yamashita Shinnihon, your Honor, has a stowage plan. Now, I don't know if that's the same thing as pre-stow. It is a stowage plan, your Honor.

MR. CORCORAN: May I at this time offer in evidence a stowage plan of the Yamashita Shinnihon Steamship Company, M/S YAMAWAKA MARU, stowage 49B, sailed New York, date 2250 to 14th of November, 1970, New York, and this is in four pages.

MR. CAMPBELL: There are two pages, your Honor, for the stowage plan going outbound and two pages stowage plan inbound.

MR. CORCORAN: Well, I would take the one that would be going outbound.

MR. CAMPBELL: That's the one you have in your hand now.

MR. CORCORAN: Thank you, Mr. Campbell.

May I offer this as Plaintiff's Exhibit 6.

THE COURT: Is there any objection?

MR. HOCKETT: No, your Honor.

xx (Plaintiff's Exhibit 6 received in Evidence.)

MR. CORCORAN: Mr. Hockett, may I have your documents?

MR. HOCKETT: You have it.

MR. CORCORAN: Oh, yes.

At this time, if your Honor please, I offer in evidence an attached series of documents given to me by Mr. Hockett on behalf of the defendant ITO, which constitutes the pre-stowage plan of this vessel.

MR. HOCKETT: Whatever is there, sir.

MR. CORCORAN: Well, we subpoenaed the records from the ITO.

MR.HOCKETT: That's it.

MR. CORCORAN: And in response thereto I am handed this document, and it is clipped together.

THE COURT: Do you have any objection if the whole thing goes in?

MR. HOCKETT: No. I have absolutely no objection

THE COURT: All right. It will be received as Plaintiff's Exhibit 7.

xx (Plaintiff's Exhibit 7 received in Evidence.)

MR. CORCORAN: And at this time, Mr. Hockett, or Mr. Campbell, would you produce the contract between the defendant, ITO, and the defendent, Yamashita Shinnihon.

THE COURT: Let me ask you, is it conceded that there is a contract?

MR. HOCKETT: Yes, your Honor.

MR. CAMPBELL: Yes.

THE COURT: Well, with that stipulation, there is no need to put that contract in evidence.

MR. CORCORAN: If your Honor please, there may be a necessity to put it in evidence to show the duties on the part of these respective parties as to what to do, and whether or not safety precautions are met, and hence I respectfully say --

THE COURT: You say may be. Now, have you looked at this exhibit before?

MR. CORCORAN: No, your Honor.

THE COURT: Well then, you just hold on to that exhibit and we will let you look at it and see if there is any portion you need. In the meantime, it is stipulated that there was an agreement between the vessel and the stevedores to load the vessel.

MR. CAMPBELL: That is correct, your Honor.

MR. HOCKETT: Yes, that is true. Your Honor, I would only ask that if Mr. Corcoran has an explanation as to why he wants certain documents in evidence, that he do it at the side bar.

THE COURT: All right. You may look at that over the lunch hour to see if there is anything contained in that which you need on this record.

MR. CORCORAN: At this time can it be marked for identification, your Honor, so its identity is known?

THE COURT: It may be marked for identification.

xx (Plaintiff's Exhibit 8 marked for Identification.)

MR. CORCORAN: "Question: Who makes out this pre-stow plan, or diagram?

"A This is done jointly with the ship's officer and the Port Captain.

"Q So that we may be informed, what is a Port Captain?

"A A Port Captain represents the ship, or the agency that the ship has employed.

"Q And on the morning of November 14, 1970, who was the Port Captain?

"A Mr. James Burt or Mr. Sal Agro. It could have been one or both.

"Q Did you see either of these gentlemen on the morning of November 14th, 1970 at Pier 6 or thereabouts?

"A Well, I don't recall if they were there or not.

"Q But in the ordinary course of events, one or the other would necessarily be there; is that right?

"A Yes, sir.

"Q Now, when you say that they jointly make this pre-stow plan, is this the diagram of the hatches and the holds of the vessel where the merchandise is to go aboard?

"A This is predicated on the cargo that has been received for loading aboard this particular vessel.

"Q In other words, the pre-stow plan permits the vessel to be loaded in such a way that she will be safe at sea?

"A Correct.

"Q And the people that prepared this pre-stow plan jointly would be the ship's officers and the Port Captain; right?

"A Yes, sir.

"Q And the Port Captain would either be an agent of the ship or the ship's agency; true?

"A Correct.

"Q Now, does ITO get a copy of that pre-stow plan?

"A Yes.

"Q Does ITO have any authority to recommend or change the pre-stow plan?

"A We do discuss it.

"Q Do you discuss it with the Port Captain and the ship's officers?

"A That's right."

MR. BROWNE: Your Honor, may I object? Really, I object on grounds of relevance.

THE COURT: Yes, I think that is so. I'm going to sustain that objection.

MR. CORCORAN: I may state for the record, your Honor, I recognize that I am not to question your Honor's ruling, and I respectfully am not, but this goes to the very description of the duties.

THE COURT: Well, let's come to the side bar and let's see what we're talking about.

(At the side bar.)

THE COURT: What has all of this to do with this man's injuries?

MR. CORCORAN: Your Honor, it will show that Mr. Joe Chuck has the authority to do all these thing that we are claiming, and it is going to be brought out.

THE COURT: What are you claiming?

MR. CORCORAN: Here, he not only -- he can tell where the hatch is and he jointly makes up the pre-stow plan and --

THE COURT: Nobody disputes that.

MR. HOCKETT: It's part of the loading and unloading of the vessels, that's part of the stevedore's job.

MR. CORCORAN: But all of this goes in as part of an Admiralty case.

THE COURT: No, it goes in as part of a case if it is relevant to the issues, and I don't see that it is at all relevant to the issues where things are to be stowed.

MR. CORCORAN: I respectfully disagree with your Honor.

THE COURT: No, the objection is sustained.

MR. CORCORAN: Then how is your ruling going to be?

THE COURT: You will just have to go forward until you get to another subject.

(In open court.)

MR. CORCORAN: Your Honor, I need further direction.

THE COURT: No, I don't think you do. Just let's go and get away from this stowage plan and all of the preparation of it and all of that. That has nothing to do with B29 this case in my opinion.

MR. CORCORAN: Your Honor, I must ask for a side bar conference to explain something to your Honor which your Honor may have overlooked.

THE COURT: I will discuss it with you at the recess.

MR. CORCORAN: "Question: How many days prior to --"

MR. HOCKETT: May we have a page and line, please.

MR. CORCORAN: Page 15, top of the page.

"Q How many days prior to November 14, 1970, did you discuss the pre-stow plan?

"A The day preceding the loading, more than likely.

"Q That would be November 13th; is that true?"

MR. CAMPBELL: Judge, this is just what you told him --

MR. CORCORAN: Well, your Honor, I must, I must have it on the record, the reasons why this is pertinent. We have to show --

THE COURT: No, no. Just a minute. Just a minute, counselor. Just a minute.

MR. CORCORAN: All right.

THE COURT: I will hear that at the break for lunch, and if there is something that you want to call to my attention that you think I made an error about, you can read that after lunch. But at this point I don't see any purpose in getting into this stowage plan any more. I have determined that that has no relevance to the issues that are raised in this litigation, so let's go beyond that.

MR. CORCORAN: Your Honor, can I answer your Honor?

THE COURT: No, please. Let's go beyond that. We will discuss this further when we break for lunch.

MR.CORCORAN: It will be out of context then at that time, your Honor. If your Honor reverses your ruling it will be out of context.

THE COURT: All right, it's out of context. Go ahead.

MR. CORCORAN: Of course, I except to your Honor's ruling. Excuse me for the time I'm taking, your Honor. I'm trying to comply with your ruling. Page 20, "Question: Sir, there have been occasions when --"

MR. HOCKETT: Excuse me, sir, but what line?

MR. CORCORAN: That would be on page 19, in the middle of the page.

"(Contining) Has there ever been an occasion with respect to the operation, between the ITO and the Yamashita Line where additional or added charges for overtime was made?

"A Sir, there have been occasions when our men worked overtime.

"Q Is that right?

"A Sure."

Mr. Hockett answered, "And the ship's owner was chargeable for that amount of overtime; is that right?

"A Yes, as per direction."

MR. CAMPBELL: You didn't complete the answer, Mr. Corcoran.

MR. CORCORAN: Oh, yes. "Yes, as per directions. Sometimes the Yamashita Shinnihon Line ordered the overtime."

Thank you, Mr. Campbell.

"Q The thrust of my question, and I don't intend to be pedantic, was, in those instances other than when the steamship line, the Yamashita Line, directly or indirectl ordered the overtime, I'm not talking about that, but I am talking about a schedule which ITO has within which to load the vessel, have there been occasions when the vessel was not loaded within the scheduled time for some reasons whether they be weather conditions or what?"

MR. HOCKETT: Your Honor, please, I objected at that time to the question and I will note my objection now.

THE COURT: Let me see the deposition. What is the basis of your objection? I don't see it in the transcrip Mr. Hockett.

MR. HOCKETT: Well, it was a continuing objection. I think it really began a few pages prior. I will try to find it.

THE COURT: Regardless of where it began or why it continued, why are you objecting?

MR. HOCKETT: Well, the main reason obviously it doesn't pertain to any of the issues in the lawsuit at bar. Overtime, charges between the vessel owner and stevedore, for that matter, I would suppose also Rudolph.

THE COURT: What is your answer to that?

MR. CORCORAN: My answer to that is this, your Honor: We have presented testimony that there was complaint accompanied by forms of coercion, shouting, that this vessel was not being loaded and it was being held up and that his men were being idle. We are going to say when that occurs, who pays for that. This is certainly relevant because we are claiming that the plaintiff was employed under a state of coercion at the time this accident occurred and hence we are leading up to and accompanying that issue with the charges for overtime. Because they have a schedule to meet.

THE COURT: I will overrule the objection.

MR. CORCORAN: Thank you, your Honor.

The bottom of page 21, "Question: I thought you told us that initially the ship --"

MR. HOCKETT: Wait a minute. You read a question and you didn't --

MR. CAMPBELL: The answer is on line 18.

MR. CORCORAN: All right. The answer, "ITO has no schedule.

"Q But I thought you told us that initially the ship informs ITO of its intended arrival and from that notice you know which vessel is to be loaded and permit it to sail and how long it's going to remain at the pier?

"A The advertised arrival dates and departure dates. This is advertised for the receiving of cargo.

"Q Where is it advertised?

"A In The Journal of Commerce.

"Q Is ITO more or less bound by this arrival and departure date or seeks to comply with it or conform with it?"

THE COURT: Sustained as to form.

MR.HOCKETT: Objection.

THE COURT: The objection is sustained as to form.

MR. CORCORAN: "MR. CAMPBELL: I object to the question in that it is like a compound question, are they bound by it and --"

THE COURT: I thought I had sustained the objection.

MR. CORCORAN: Then I say, "I think that's a good suggestion," and now I ask the question -- I agreed with him.

"Counsel suggests that I make the question in two parts.

"In the first place, does ITO subscribe to The Journal of Commerce?"

MR. HOCKETT: I'm going to object. I don't know if this individual knows or not.

THE COURT: What is the answer? Go ahead. Overruled.

MR. CORCORAN: "To my knowledge, we do not.

"Q You mentioned arrival and departure dates in

The Journal of Commerce?

"A Yes, sir.

"Q And how is that brought to the attention of ITO?

"A Oh, we receive that data in The Journal. That is what I mean.

"Q Then you are a subscriber?

"A Yes, I thought you meant me personally.

"Q All right. We are on the same antenna now.

"A Yes, sir.

"Q Does ITO, as a year-round stevedore, do the work of the Yamashita Shinnihon Line on a annual basis? Does it make a practice to look in The Journal of Commerce for arrival and departure dates of vessels they are going to work on?

"A Yes, sir.

"Q And does ITO attempt with due diligent efforts to load or unload the vessel between the arrival and the departure times set forth in The Journal of Commerce?

"A The amount of manpower aboard, it's per direction of the steamship line each day.

"Q Daily?

"A Daily.

"Q So that in effect the steamship line is more or less in control?

"A Correct.

"Q Is that right?

"A Correct.

B30 "Q Control of the loading operations with respect to time?

"A That's right.

"Q Is that right?

"A Yes.

"Q There are strikes occasionally by the ILA, are there not?"

THE COURT: Sustained. Sustained.

MR. CORCORAN: "Question: And there are bad weather conditions which might interfere with the loading and unloading, right?

"A Yes, sir.

"Q Now, apart from that, which would be normal excuses when the vessel's loading or unloading operation would be deferred apart from that there are times when ITO does not load or unload the vessel as the case may be within the arrival and departure times set forth by the Yamashita Line in The Journal of Commerce."

MR. HOCKETT: I'm going to object. This is so highly speculative. I don't know exactly what it means anyway.

THE COURT: I don't undestand what you're getting at with all of this, Mr. Corcoran.

MR. CORCORAN: I am trying to give a picture to your Honor and to this jury --

MR. CAMPBELL: Your Honor, can we do this at the side bar? I think Mr. Corcoran is now testifying.

THE COURT: I think he is. I must confess I invited it. Let's go to the side bar.

(At the side bar.)

MR. CORCORAN: Here then he says, you may answer. He withdraws his objection.

MR. HOCKETT: No, I don't. No, I don't.

THE COURT: The objection is as to everything except form to the time of trial. Now, what is the relevance of all this? You want to show that Joe Chuck was motivated to chew him out because the block wasn't ready, that's what it amounts to; is that what it is?

MR. CORCORAN: No.

THE COURT: If it isn't that, what is it?

MR. CORCORAN: I want to show to this Court that ITO under its agreement with the Yamashita Shinnihon Line was required to load this vessel within a specific period of time. That the failure of the defendants Rudolph to furnish and provide a crane suitable to lift up the heavy cargo set forth in the stowage plan was the cause of the delay, and that they did not provide a crane --

THE COURT: Well, you haven't even shown there was a delay at this point.

MR. CORCORAN: That's what this is all about.

MR. CAMPBELL: This is hypothetical. And Mr. Joe Chuck does not represent --

THE COURT: Wait. Is there going to be any proof that this vessel was delayed in leaving or any proof that the vessel was required to pay unusual excessive charges to ITO? Is it in this transcript?

MR. HOCKETT: No.

THE COURT: It is not in. Then this is all irrelevant.

MR. CORCORAN: Mr. Maguilo, the pier superintendent, is complaining in his testimony that his men are idle.

THE COURT: All right.

MR. CORCORAN: Because of the fact that the crane was not promptly provided.

THE COURT: All right. Let's get that in, but let's get away from this arrival schedule.

MR. CAMPBELL: As Mr. Corcoran well knows, the vessel came in the day before. It left that day, the day of the accident. There is no over-stowing of the vessel in this port, he knows that.

THE COURT: All right, then there is no basis to get in any of this Journal of Commerce bit.

MR. CORCORAN: No, I disagree, your Honor. This is all part and parcel of my proof to show the duties --

THE COURT: I will permit you to show that while the block was being changed the men were idle because it wasn't in position for whatever argument you are going to make from it. That is as far as I can --

MR. CAMPBELL: Mr. Joe Chuck does not represent the steamship company.

THE COURT: I understand that.

MR. CAMPBELL: So no one from the steamship company came down and berated this man.

THE COURT: I opened the door here, and I don't know whether it is relevant or material to show that while the block was being changed a crew of stevedores was not working, that's all. If that apparently is the fact. Nobody disputes that.

MR. BROWNE: I guess we will agree to that.

MR. HOCKETT: We could stipulate for the period of time it took to change the block the longshoremen cannot go ahead with their job. I don't think there's any dispute about that.

THE COURT: There is no dispute about that.

MR. CORCORAN: Your Honor, I respectfully submit that the prohibition contained in your ruling barring me from --

THE COURT: What is it you want to show?

MR. CORCORAN: I want to show all of the duties, all of the circumstances that obtained that morning.

THE COURT: No, you didn't ask me for that. You came around here with a specific line of questions having to do with ITO operating within a framework set up by The Journal of Commerce when the vessel was coming in, when it was going to leave. That area I ruled to be irrelevant because you made no representation the vessel left late.

MR. CORCORAN: No, but his men arrived, they are standing by doing nothing.

THE COURT: They are prepared to stipulate to that, and I agreed you could ask that. And they are prepared to stipulate to that fact.

MR. CORCORAN: I cannot accept that stipulation.

THE COURT: All right.

(In open court.)

MR. CORCORAN: Page 28.

"Q Now I would say you would be better informed than I because you are actually 21 years in this specialty.

Would you tell us please what are some of the instances of insufficient gear or tackle or whatever?"

MR. CAMPBELL: Your Honor, I object to it. There is no testimony in this case that there was insufficient gear or tackle as to the vessel, the Japanese vessel. That is what he is asking Mr. Joe Chuck about.

THE COURT: Let me see the deposition. Yes, I sustain the objection.

MR.CORCORAN: Page 29.

"Q Now, you also mentioned an insufficient gear. Was that incapable of making the particular lift that was required? There have been instances of that sort; isn't that so?"

MR. HOCKETT: I object, your Honor.

MR. BROWNE: Objection.

MR. CAMPBELL: I object, your Honor.

THE COURT: Yes, sustained.

MR. CORCORAN: Your Honor, I wish to make a -- how will the court reporter reflect the pages that I'm not to read so that for the record on appeal in the event such a review is necessary --

THE COURT: Well, we will talk about that at another time.

MR. CORCORAN: Then how do I go now, I mean?

Can I go to each page, which looks like I'm going to each page and you will sustain it but it doesn't appear if you are sustaining the whole page or what? In other words, I am bound by your rulings, of course, and I wish to respectfully adhere to them, but in order to not be chargeable with neglect and protecting the record --

THE COURT: All right, we will talk about this at the recess. How to make an appropriate record for you. We will talk about it at the recess. You go ahead with the questions you feel are relevant and admissible.

MR. CORCORAN: Page 30.

"Q Have there been instances, Mr. Maguilo, where, for instance, a crane is rigged up insufficiently or inadequately to make a certain lift?

"A Yes."

MR. HOCKETT: Again, your Honor, I object.

MR. BROWNE: Your Honor, he is not reading the -- I would object.

THE COURT: Well, you have three transcripts at that back table, why don't you let me have one of them and I can deal more efficiently with this.

MR. CORCORAN: At the bottom of page 30, your Honor.

THE COURT: Yes, I'm going to sustain that objection. This is the question at line 15.

MR. CORCORAN: In order to ask my next question, your Honor, that answer has to appear.

MR. BROWNE: Your Honor, I object to what is going on now. It is as if somebody was doing something unfair, and nobody is doing anything unfair.

THE COURT: Sustained.

MR. CORCORAN: At the top of page 31.

"Q And when you said rigged inadequately, those words are meaningful to you, are they not?

"A Yes."

B31 MR. BROWNE: Objection.

THE COURT: Yes, sustained. Strike out the answer.

MR. CORCORAN: "Question: Of course, go ahead.

"A When we order a crane we order it for the heaviest piece we have.

"Q That is the thought of the question I am propounding to you, and I want an answer to that."

MR. BROWNE: I think that is the question that your Honor has already sustained an objection on.

MR. CORCORAN: No, this is a new question on page 31.

MR. BROWNE: Objection, your Honor.

MR. CORCORAN: There was no objection at the time of the deposition, your Honor. It was coming right down to the heart of our case.

THE COURT: Well, I'm going to sustain the objection to the answer which begins on line 21, if that is what you are leading to.

MR. CORCORAN: At the bottom of page 21.

THE COURT: At the bottom of the page, and it is because of the generality of it, not because of the content. We are dealing with a specific morning, November 14th, 1970.

MR. CORCORAN: And if that answer can be tied up to later testimony where he is referring to November 14th-

THE COURT: No, no. No comments, please. Let's just go on to the next question.

MR. CORCORAN: The top of page 32.

"Q Until a rig was properly rigged with sufficient equipment, whether it be cable or block to make the lift, isn't that so?

"A Yes, sir.

"Q So that would be one of the additional causes of delay; isn't that so?

"A Possibly."

MR. HOCKETT: I still think we are talking about generalizations.

THE COURT: All right, I will permit those questions and answers to stand.

MR. CORCORAN: At the bottom of page 32.

"Q When you answered my question before, Mr. Maguilo, were you referring to offshore cranes?

"A I asked you earlier if that is what you were referring to and you said yes."

Top of page 33.

"Q And your answer was in response to that question, was it not?

"A Yes.

"Q Now, you say we order a crane to make the lift of the largest, or heaviest cargo, that you are going to lift; is that so?

"A Yes.

"Q And when you say we order, you mean ITO?

"A No. The steamship line.

"Q The steamship line?

"A Yes.

"Q And is it the accepted practice for the steamship line to always order the floating rig, or is that the resonsibility of ITO?

"A The steamship line.

"Q Now, ITO you described as a stevedoring company; is that right?

"A That's right.

"Q So that we may distinctly know what is meant by stevedoring, just tell us briefly, in one sentence, what your concept of that is.

"A Unloading and loading of a vessel.

"Q Now, the loading and unloading of vessels is done in many ways, many different ways, is it done manually?

"A Yes, sir."

MR. BROWNE: Your Honor, objection.

THE COURT: Yes, I think this is irrelevant. Sustained.

MR. CORCORAN: "Question: Will you tell me how the loading operation is done?

"A Various types of cargo are placed on racks such as pallet. These are in turn hooked into the --"

THE COURT: Mr. Corcoran, this has nothing to do. We are talking about in this case a container or certain containers with different tags on them that were facing plaintiff here that morning in his tasks.

MR. CORCORAN: Page 35.

"Q Are there occasions when in addition to using the ship's gear, which you said embraced booms and winches, is there a loading operation by means of say a floating crane?

"A Yes, sir.

"Q What do you call it?

"A A floating crane.

"Q What do you call it when it's done by a floating rig, does that have a different name?

"A No, it's the use of the floating crane for the use of hoisting.

"Q When does it become necessary from your experienc and knowledge to use the floating crane instead of a ship's gear?

"A If the crane winches are inoperative or the booms and crane are both in use, or when you are lifting or unloading heavy cargo surfacing the ship's gear.

"Q In other words, if the ship's gear would be inadequate to make a lift you would call in the floating rig?

"A Yes."

MR. BROWNE: Your Honor, objection. We stipulated the --

THE COURT: I know. This is cumulative.

MR. CORCORAN: Page 38.

"Q Please do that.

"A --"

MR. BROWNE: Objection, your Honor. There is no way the jury is going to know what that means, Judge.

MR. CORCORAN: Then I will go back, Mr. Browne.

THE COURT: Don't we already have testimony in the record without dispute that the cranes of the vessel were inadequate to lift this particular load?

MR. BROWNE: That's correct.

THE COURT: An nobody disputes that fact.

MR. CORCORAN: Well, the record -- will they stipulate that the lifting capacity of the cranes aboard the YAMAWAKA MARU had a three-ton lifting capacity?

MR. HOCKETT: Suffice it to say that --

MR. CAMPBELL: They didn't have a 25-ton lifting capacity.

THE COURT: They didn't have a 25-ton in any event.

MR. CORCORAN: But my question here pertains to three-ton, and the witness so states that. Will they stipulate that?

MR. CAMPBELL: No, we will not.

MR. CORCORAN: Then I should be permitted to ask that question as a fact.

THE COURT: You will stipulate that the record shows that the witness said that the vessel had a three-ton lifting capacity. They will stipulate to that. Very good. Go ahead.

MR. CORCORAN: And we are talking about the YAMAWAKA MARU.

THE COURT: Right.

MR. CORCORAN: All right.

At page 39.

"Q Tell us, please, what that type of cargo was.

"A To the best of my recollection it was containers and heavy machinery.

"Q We laymen may not know what a container is. Would you describe it?"

MR. BROWNE: Excuse me, your Honor.

MR. CORCORAN: No, now we are going into the cargo that's going to be lifted.

"Q We laymen may not know what a container is. Will you describe it?

"A A container comes in various sizes, 8X8X8, 8X20X8, 8X40X8.

"Q When you say 8X8, you are talking about feet?

"A Yes, sir. Eight feet high, eight feet deep or twenty feet deep, or forty feet deep.

"Q And the YAMAWAKA MARU would be unable to, if I understand correctly, to make the lifts of these containers?

"A If they are stuffed.

"Q If they are filled?

"A If they are filled, stuffed.

"Q What, in your estimation, would be an 8X8 container stuffed?

"A Maximum about 4-1/2, 5 tons.

"Q 8X20X8?

"A Twenty tons."

MR. BROWNE: Your Honor, this could be stipulated I'm really trying to save time and I'm not succeeding in that.

THE COURT: I appreciate that.

MR. CORCORAN: The top of page 48.

MR. BROWNE: Your Honor, I object to that because the tonnage in the record is 25 tons of this thing. I'm sure Mr. McSweeney so testified. I don't see what difference it makes if some of them are 30 tons.

THE COURT: All right. I agree. But, go ahead. The answer may stand. Next question.

B32 MR. CORCORAN: "Question: And you look over what the job was to be done on that particular day lining up the various ship foremen and hatch foremen; is that right?

"A This is set from the day before.

"Q Anyway, you become knowledgeable or alerted to whatever is to be done that day; isn't that so?

"A Yes.

"Q Now, tell us shortly after your arrival what you remember, what is your best recollection as to your activities. Tell us what you did, having in mind November 14, 1970.

"A Just what I do every day that we have a vessel. I check the surrounding areas of any lighters that report to the pier.

"Q What is a lighter?

"A An open barge, or a closed barge containing or not containing cargo.

"Q And what would your interest in checking these surrounding areas for lighters be?

"A Cargo probably reporting for the ship in question to be loaded.

"Q Anything else? Do you check the surrounding areas? What else did you do?

"A Make sure our gear is ready for the loading and that day's work.

"Q When you say make sure our gear is ready for the loading that day, what gear are you referring to?

"A Lighter or heavier gear, such as wires, bridles, slings.

"Q Did you do that that morning as is your custom?

"A That is normal.

"Q And when you say our gear, is this gear owned by ITO?

"A Yes, sir.

"Q Consisting primarily of lifting gear in the nature of wire cables and so on, slings, bridles and so on?

"A Yes, sir."

Page 42.

"Q You checked high loads. What else?

"A All the gear that is owned or operated by ITO.

"Q Now, the floating crane that we are talking about, would you describe that to us just briefly?

"A The one we are talking about?

"Q Yes, sir.

"A The Rudolph crane?

"Q Yes, sir. Do you remember if it had a name or a number?

"A The Rudolph 5.

"Q The R-5?

"A R-5.

"Q Describe that to us briefly, if you will, please.

cmds

What does it look like?

"A It's a floating crane. It comes with a crane and has a boom sitting on its loading box.

"Q Have you been familiar with the R-5 and similar types of loading floating rigs in the course of your experience?

"A I have had occasion to work with it, yes.

"Q Now, you have mentioned that it has a boom sitting on its loading barge?

"A Correct.

"Q Would you please, and I am certain you do know, tell us what a boom is?

"A --"

THE COURT: Well, we have a photograph in evidence, and the witness described it, the man who operated it. Do you need this?

MR. CORCORAN: Your Honor, I will defer reading that.

THE COURT: All right.

MR. CORCORAN: Voluntarily.

Page 44.

"Q Now, at the end of the cable, at it comes off -- at the end of the boom there is usually another apparatus known as a block. Are you familiar with that?

"A Yes, sir.

"Q Tell us, please, what a block is.

"A A block is what we affix the hooking wires to be used to.

"Q In other words, at the end of the block is a hook?

"A Right -- correct.

"Q Then you put your bridle or slings on that hook?

"A Correct.

"Q And then with the proper signal you either tell the operator to raise it, the boom, or whatever; right?

"A Yes, sir.

"Q You are familiar with the signals to the crane operator, are you not?

"A Yes, sir.

"Q And you have done that in the course of your own experience?

"A Yes, sir.

"Q As either a longshoreman or a hatch boss or a shift boss; right?

"A Yes.

"Q Long before you became superintendent; right?

"A Yes, sir.

"Q Now, are there different types of blocks of different capacities?

"A Yes, sir.

"Q On the morning of November 14, 1970, tell us where the Rudolph rig was.

"A In the south inner berth.

"Q At Pier 6?

"A Yes.

"Q Had the R-5 been at this south inner berth the day before, November 13th?

"A To the best of my recollection, yes.

"Q And having this in mind on November 14, 1970, how many days prior to that had the YAMAWAKA MARU been worked on?

"A To the best of my recollection, the day before, or maybe one day prior to that.

"Q So that it was either one or two days prior to November 14; right?

"A Yes, sir.

"Q And had you observed the operations of the R-5 on these prior days in the course of your rounds as superintendent?

"A Yes, sir.

"Q And do you recall what type of block was on the R-5, say, on the morning of November 14, 1970?

"A I believe it was a single block.

"Q When you mention a single block how many parts are there to a single block?

"A Single, one.

"Q Would it be more correct, and you may be the final authority on it, is it not that the single block consists of two parts?

"A Quite probable. As I say, we use many cranes, each crane is different.

"Q By the terminology of a single block is also the same terminology in rigging --"

MR. HOCKETT: Your Honor, again I think this type of testimony was gone into.

THE COURT: Yes, there is no dispute about these facts, Mr. Corcoran. Let's get on to what his testimony is as to the events of the morning, if you will.

MR. CORCORAN: At the bottom of page 47. I think that's pertinent.

"Q And had that single block been in use, say, the day before on the R-5?

"A I believe so.

"Q And in operation, working on the YAMAWAKA MARU, say two days before it was the same block?

"A I believe so."

At the bottom of page 49.

"Q On the morning of November 14, 1970, did you have records showing the lifting of the passage of the R-5 boom?

"A We have a standard thing that is put out by Rudolph. It's a standard thing. The R-5 maximum pickup capacity is what they can pick up. Each individual company sends us one.

"Q Does the ITO still have that?

"A Yes, we have page 50.

"Q Can you tell us, to the best of your ability, Mr. Maguilo, what was the lifting capacity on the morning of November 14, 1970, of a single block which you observed on the boom of the R-5?"

THE COURT: Sustained.

MR. CORCORAN: "Question: What was the nature of the equipment that had been lifted say for the day before or two days in the event it was two days prior to November 14th, was it less than 15-ton?"

MR. HOCKETT: Objection, your Honor.

THE COURT: Yes, again sustained.

MR. CORCORAN: "Question: Were there other cargo that was about to be put aboard the YAMAWAKA MARU that was in excess of 15 tons?

"A Yes.

"Q And what was that cargo?

"A As specified, containers or heavy machinery."

B33 Page 52.

"Q Did you see the size of these containers that were to go aboard the YAMAWAKA MARU?

"A As I specified earlier, it would have been 20 or 40-footers. I don't recall.

"Q When you say a 20 or 40-footer, translate that into weight for me in tonnage.

"A A 20-footer would be what --"

MR. HOCKETT: Again, your Honor, I object.

THE COURT: Yes, he said this before. It is cumulative. You asked him these questions earlier.

MR. HOCKETT: In addition, your Honor, the testimony of Mr. McSweeney who went up and saw the tag, that is I think the relevant testimony.

MR. CORCORAN: Page 53.

"Q And where did you get these loading lists from?

"A From the dock receipts and booking receipts that are received at the terminal.

"Q Docking receipts and what else?

"A And booking receipts.

"Q And where do you get them?

"A The booking receipts come from the steamship line's office. Dock receipts are brought to the terminal with the cargo that is supposed to be contained in the booking receipts.

"Q In other words, the dock receipt is a tag that is attached to the container?

"A The dock receipt is a form of docket."

MR. BROWNE: Your Honor, I object again on the grounds it is cumulative. We know precisely what the container weighed, precisely where it was, what time it was there.

THE COURT: I know. I agree. I will leave the answer stand, but let's get on. I will permit the answers to stand, but let's get on.

MR. CORCORAN: I didn't get any answer, your Honor.

THE COURT: I thought you did. You have been reading questions and answers here about dock receipts.

MR. CORCORAN: Yes, but then we asked the weights.

THE COURT: I know, but Mr. McSweeney has told us what the weight of this one was which necessitated the change of the block. But let's go forward, please.

MR. CORCORAN: Well, will counsel concede that the weight of the container to be loaded was 50,000 pounds?

THE COURT: Mr. McSweeney has so testified, and so far I have heard no dispute of it in the record. Now, let's go ahead.

MR.CORCORAN: All right. Do I have that concession?

THE COURT: No. We will please go ahead.

MR. CORCORAN: On page 59.

"Q Does the hatch foreman or the ship foreman or yourself from time to time in your travels around say, let me look at your receipts, let me look at the papers showing me how much you have got aboard, or what?"

MR. BROWNE: Your Honor, may I have an objection at the side bar?

THE COURT: I will sustain that objection. I am going to take a recess for lunch.

Ladies and gentlemen, we are going to stand in recess until 10 minutes after 2:00 which will give you a little longer lunch hour than usual, and thank you.

Counsel will please stay for a few minutes.

(Jury leaves the courtroom.)

THE COURT: Go ahead, Mr. Browne.

MR. BROWNE: Judge, there are about 400-odd pages of deposition in this case. You have my copy of this one. It's 125 pages long. Mr. Rudolph's deposition is about 86 pages long. Dr. Cook's deposition is 74 pages long. Roughly about 400 pages, give or take.

It seems apparent to me that counsel is going to go over each and every page, and I don't think this is making a -- it's making an impression on the jury, but there is no way to tell what the impression is. My thought is that if that is counsel's intention, that the whole thing be sumitted to the Court over the recess or after the recess and the Court take out what is relevant, because so little of it is relevant.

THE COURT: Well, I can only deal with one at a time, and let me just for the moment deal with this and hope that it rubs off.

Mr.Corcoran, I'm going to direct you to go forward to where Mr. Maguilo starts to talk about his conversations with the plaintiff on the morning of November 14th, and whatever else he observed that morning about the crane and this container, or anything that is relevant to the issues that are raised by these pleadings. That may mean you will have to skip some 30 or 40 pages, but I do not want to get into any more descriptions of blocks, generally, of cartons, generally, of piers or farm areas, booms, of anything of that kind, and if there is anything between where you start and where we are now that you feel is unfairly omitted, I will hear you on it separately.

If you want to make a record claiming that I have unfairly excluded something, you may point that out to me and I can rule on that specific question at a side bar conference at the end of the day. But in the interest of time I want you to get down to some brass tacks here, because for the last 15 or 20 pages we have had nothing but generalities about things that nobody disputes.

With that in mind please, over the luncheon recess, let's get down to things that are relevant. You are very experienced counsel of many trials, you know what isn't relevant. Let's get to it.

Simiarly with the other depositions. I would appreciate it if you do exactly the same thing. We don't need cumulative things, we don't need anything these gentlemen don't dispute. And the jury is here to decide issues and not to listen to things that I regard frankly as cumulative and irrelevant.

MR. CORCORAN: At this stage in this trial, your Honor, I am under a duty to make out a prima facie case, and I submit respectfully to you that the fragmentation of the depositions in complying with the Court's orders and rulings will seriously impair the plaintiff's case

Now, counsel for the defendants Rudolph mentioned that there are some 400 pages of depositions. I daresay, your Honor, that the reading of the deposition of Mr. Maguilo or Mr. Rudolph would be substantially less in time if these persons were on the witness stand. Their testimony might have taken two days each with direct and cross-examination. Whereas I, in reading this deposition and reading it at a pace that is not slow, am aiding and assisting this Court in getting to the facts sufficiently knowledgeable to the Court and to the jury.

So that in substance, I think my reading of the depositions is saving the Court time. And as I say, it is our contention that the defendants Rudolph, knowing of the cargo that was to be put aboard this Japanese vessel, furnished a crane, to wit, the R-5 --

THE COURT: Let's not get down into arguments on the merits. All I'm saying is that the depositions contain a great deal of material that is no longer in dispute. It's not necessary. It is irrelevant, or is cumulative, and that should be omitted and I will see you at 10 minutes after 2:00

(Luncheon recess.)

AFTERNOON SESSION

2:20 p.m.

B34 (In open court - jury present.)

THE COURT: Mr.Corcoran.

MR. CORCORAN: Following your Honor's ruling, I have gone through the deposition during the luncheon recess, and I have omitted, or, will omit --

THE COURT: Well, go to what you want to include, and let's begin.

MR. CORCORAN: In accordance with your ruling.

THE COURT: Very good.

MR. CORCORAN: At the bottom of page 60.

"Q And who was it that had this heavy cargo list of the YAMAWAKA MARU on November 14, 1970?

"A Everyone involved with the cargo.

"Q Including ITO?

"A Yes.

"Q Did you have occasion to look at their weights from the tags that would be attached to them?

"A Possibly from the tags, or from the loadings."

MR. HOCKETT: Excuse me, Mr. Corcoran, where are you reading from?

MR. CORCORAN: Page 62. The top of page 63.

"Q Would it be fair to say that it is most important in your capacity as superintendent to make certain that the cargo, with respect to weights, is put aboard the vessel in the right stowage so that there is no listing of the vessle while at sea?

"A Correct.

"Q That is an accepted practice, isn't it?

"A We loaded per direction."

MR. CAMPBELL: Your Honor, I don't know if there is any claim there that the vessel listed at sea, but I don't see the relevancy of this.

THE COURT: Let's see what the next area is.

MR. CORCORAN: "Question: Or would you seek to correct that with the ship's officers or the Port Captain?

"A It would be discussed.

"Q In other words, you job is to make an assist safe journey event of that vessel, isn't that so?

"A Yes.

"Q Now, by the way, are you familiarly called by some other name?

"A Yes, sir.

"Q What do they call you?

"A Joe Chuck."

At the bottom of page 64.

"Q Do you remember when you came on duty that morning of November 14th that you observed that the R-5 was rigged up with a single block?

"A To the best of my recollection the R-5 was in a straight out position.

"Q Now will you answer my question?

"A Once again, to the best of my recollection I believe it was in that position because it was going to change from a single to a double block.

"Q Was it in a straight out position?

"A Yes.

"Q In other words, you are describing the angle on what the boom is laying?

"A Yes.

"Q Did it have a gooseneck on it?

"A I believe the R-5 had a gooseneck, right.

"Q So when you say it was in a straight out position you mean 180 degrees, or less than that?

"A Well, it would be about that.

"Q When it's in a working position, would you say it's about 75?

"A Yes.

"Q At that time it was in a straight out, or approximately 180 degrees, or approximately that, or nearing that; right?

"A Yes.

"Q Did you have anything to do with ordering the change from the single block to the double block?

"A As a reminder, or as an order?

"Q In either way,

"A As a reminder, I believe.

"Q Tell me who you were reminding.

"A I believe this gentleman here (indicating).

"MR. CAMPBELL: You are indicating Mr.McSweeney.

"THE WITNESS: Yes.

"Q And tell us what was the nature of the reminder to the best of your knowledge on that occasion? And I don't think the reporter will be offended by any language you use, because as a reporter they are familiar with it."

MR. HOCKETT: I move to strike the last part of the question.

THE COURT: Yes, strike that out. Let's just go to the answer. "What was the nature of the reminder?" Answer. Go ahead.

MR. CORCORAN: "Answer: My recollection is that I believe I spoke to Mr. McSweeney and asked what was being done, when were they going to change to a double.

"Q You asked when they were going to change to a double?

"A Yes, sir.

"Q Was that because a single block was inadequate to lift up large 20 to 40-foot containers?

"A I believe so.

"Q Would you find fault with my knowledge of rigging if I were to tell you a single block was two-part and a double part was four-parts?

"A No, I would not.

"Q Would it be fair to say when you described it as a double part it would be four-parts?

"A It would be.

"Q In any event, they were going to make the change?

"A Well, they were ordered inasmuch as the crane was ordered for a maximum lifting capacity.

"Q But apparently they had worked the day before, or two days before, with a single block; is that right?

"A Possibly.

"Q So that it didn't have it's maximum lifting capacity; is that right?

"A Yes.

"Q And therefore, tell us in your own words, on the morning of November 14, 1970, what you said to

Mr. McSweeney in the nature of a 'reminder' as to the change of block. Just tell us in your own words.

"A Would they be ready for 8:00 o'clock.

"Q What did he say?

"A To the best of my recollection I believe he said, no.

"Q And what time of the day or morning did you ask him this question?

"A Maybe twenty to 8:00 or a quarter to 8:00, I'm not sure. 7:30.

"Q Where were you when you said that to Mr. McSweene

"A Standing in the farm area adjacent to the crane.

"Q Was the crane tied up to Pier 6?

"A Yes.

"Q And I take it that the boom of this crane, including the gooseneck, would be able to reach whatever the 20 or 40-foot containers were laying in this farm area?

"A No, we would place them there.

"Q Would they first have to be moved closer to the R-5?

"A They are put directly under the hook and to the pier, whatever he hooks, whatever position.

"Q By what means are they brought to the farm area?

"A By the ITO machinery.

"Q What type of machinery is used?

"A Hi-lo, or heavy hi-lo, whatever is necessary.

"Q What is the capacity of that lift?

"A 30-ton, 25-ton, 15-ton. We have various tons.

"Q Are these heavy hi-los operated by employees of ITO?

"A Yes, sir.

"Q And they are called longshoremen?

"A Yes, sir.

"Q When you asked Mr. McSweeney at about 7:30 or 7:40 or 7:45 on the morning of November 14, 1970 --

"MR. BROWNE: Objection, he didn't say 7:40.

"Q What did he say? 7:30?

"A I gave various times. I don't recall myself.

"Q Roughly that is the time?

"A It was prior to 8:00 o'clock.

"Q You asked Mr. McSweeney whether it would be ready by 8:00 o'clock and he said, no; right?

"A Yes.

"Q Did you then ask him when it would be ready?

"A Yes, I believe I did.

"Q What did he answer?

"A After 8:00 o'clock.

B35 "Q Weren't you more interested, did you ask how long after 8:00 o'clock?

"A Well, I guess he meant in an area of 8:30, 9:00 o'clock.

"Q Were you satisfied with that answer?

"A No.

"Q What did you say?

"A I answered, how come it wasn't ready."

Page 72, the middle of the page.

"Q That is true. In any event, it prompted your question, how come it wasn't ready; right?

"A Yes, sir.

"Q You were a little shy, concerned about the fact it wasn't ready --"

MR. HOCKETT: Can I object to that point? It was asking for the operation of the man's mind.

THE COURT: No. Overruled. I will allow it.

MR. CORCORAN: "Answer: Yes, I guess I was."

We omit page 73, your Honor.

Page 74.

"Q Was there a delay in putting aboard these containers during the time that it took to make the changeover from a single to a double block?

"A In the way of manpower. Now or for the vessel?

"Q Either way. Say manpower.

"A For the four men that I had employed to hook up the heavy pieces.

"Q Right. How many men did you have to hook up the heavy pieces?

"A I believe there were four.

"Q So they would be waiting until the change was completed; right?

"A Yes.

"Q Would that, say the delay of a half-hour, or an hour that this might take, or did take to make the changeover from a single to a double --"

THE COURT: Hold on. The answer doesn't respond to the question at all, so I sustain the objection to reading the question.

MR. CORCORAN: I don't follow your Honor.

THE COURT: Anything in the world is possible. That is not an answer.

MR. CORCORAN: That's what the witness said.

MR. HOCKETT: Furthermore, your Honor, there was no testimony about an hour or anything.

THE COURT: I sustain the objection.

MR. CORCORAN: "Question: In other words, the holdup on the containers might have caused a chain reaction of holdup in other areas of stowage; right?"

THE COURT: Sustained.

MR. CORCORAN: "Question: And in the course of your question 'How come it wasn't ready', did you say to Mr. McSweeney why it wasn't done yesterday?

"A I believe I said that already.

"Q Did you make any statement to Mr. McSweeney in words or in substance that said, you fellows were doing nothing all day yesterday on account of the rain, why didn't you hook it up? Did you say anything like that?

"A I possibly may have.

"Q In the form of a complaint; right?

"A Possibly.

"Q You were dressing them down, in other words?"

THE COURT: Sustained.

MR. CORCORAN: "Question: You were finding fault with them, weren't you? You were complaining that they could have done it yesterday, why wasn't it done yesterday?

"A Yes.

"Q You were complaining.

"A Yes.

"Q Now, when you asked them this question, how come it wasn't ready, was it said in a sort of a conversational tone?

"A Yes, sir.

"Q Was it said in a loud boisterous tone?

"A I can't say how it was really said. It would be the way the receiver would take it. There may have been machines running at the time. I may have been talking in a loud pitch. I don't know."

Omit page 77, your Honor. Page 78 omitted. Page 79 omitted.

Page 80.

"Q Do you know what the expression means, breathing down a fellow's neck?

"A In my understanding it means standing over him. Saying something over him.

"Q Right. In a loud pitch. Why wasn't that done yesterday, or words to that effect; right?

"A Yes."

MR. HOCKETT: Mr. Corcoran, you left out a sentence, the witness' expression after that, this is what you are asking? Taking a lot of this out of context.

MR.CORCORAN: I will read it over.

"Q Do you know what that expression means, 'breathing down a fellow's neck'?

"A In my understanding it means standing over him and saying something over him.

"Q Right. In a loud pitch. Why wasn't that done yesterday, or words to that effect.

"THE WITNESS: This is what you are asking?

"Q Right.

"A Yes."

MR. HOCKETT: I think --

THE COURT: Yes, we have to keep going.

MR. HOCKETT: If you are going to stop there, I would object.

THE COURT: Yes, you have to keep going. Over to the top of page 81, otherwise there is no sense to it.

MR. CORCORAN: Well, if your Honor pleases, if counsel wants to read whatever I omit, that is under the rule --

THE COURT: Well, I will strike out what you read because it doesn't make any sense. Because the "Yes" refers to a clarification of what the question is, and not affirmation of any fact.

MR. CORCORAN: Page 81.

MR. HOCKETT: Judge, I think I will resolve the problem.

THE COURT: I will strike out that last series of questions and answers.

MR. CORCORAN: "Question: Did you call up

Mr. McSweeney's boss, Mr. Rudolph, and make any inquiry of him?

"A I may have, I don't recall.

"Q Do you know Mr. McSweeney's boss to be Mr. Rudolph, who is here?

"A Yes, sir.

"Q And you knew his father and uncle before him?

"A Yes, sir."

Page 82.

"Q Well, if it happened frequently would that be a cause for some inquiry by ITO or the ship, why the delay?"

MR. HOCKETT: I am going to object, your Honor. It happens frequently, I assume he means not having the --

THE COURT: Where are we here?

MR. HOCKETT: The top of page 82.

MR. CORCORAN: The question, your Honor, that I read was --

THE COURT: Starting at line 6?

MR. CORCORAN: Line 6.

THE COURT Is that the beginning of the whole sequence?

MR. CORCORAN: No. I will read it again. I read two questions there, because Mr. Hockett had made an objection. I think in its complete content I withdraw the word "frequently" which was the basis of his objection.

"Q Well, if it happened frequently would that be a cause for some inquiry by ITO or the ship, why the delay?

"MR. HOCKETT: Objection. There has been no testimony that it happens infrequently.

"Q I didn't mean to say frequently. Did it happen at all, did a thing like that happen in the past?

"A I would go to the --

"Q And what would you say?

"A The crane is not ready.

"Q You would put the blame on the --"

MR. BROWNE: I move to strike that whole sequence, your Honor. It doesn't make any sense to me.

THE COURT: No, I will let it stand.

MR. CORCORAN: It may make sense to the jury.

THE COURT: I will let it stand. All right, go ahead, sir.

MR. CORCORAN: Page 84.

"Q And from where the R-5 was, was the YAMAWAKA MARU visible?

"A Oh, yes.

"Q You could see it?

"A Sure."

Page 85, middle of the page, your Honor, at line 13.

"Q Did you ever talk to the first mate on the YAMAWAKA MARU?

B36 "MR. CAMPBELL: Do you mean at this particular time, or in his 20 years as a longshoreman?

"MR. CORCORAN: I mean at this particular time.

"Q While the YAMAWAKA MARU was in berth.

"A Yes, sir, I did.

"Q And he speaks English?

"A Yes.

"Q Do you remember his name?

"A No, sir.

"Q What is his title?

"A Chief officer.

"Q How did he relate to the first mate?

"A They are on the same parity."

The balance of the page omitted.

Page 87.

"Q Mr. Maguilo, would you say that the ship's officers were interested in the progress that the loading operations were taking?

"A Would they be interested on the progress of the work on the ship?

"Q Of the loading.

"A Of the loading?

"Q Yes.

"A Yes, they would be.

"Q Would they from time to time make inquiry from you or somebody else, like a Port --"

THE COURT: Wait. Wait. Is there going to be anything to follow all of this up?

MR. CORCORAN: This is what's following --

THE COURT: On the next page he says, "I don't recall."

MR. CORCORAN: I think the next question and answer are certainly pertinent and relevant.

"Q Would they from time to time make inquiry from you or somebody else like a Port Captain as to how things are going?"

MR. HOCKETT: Your Honor, you see we are not talking about the date of the accident now.

THE COURT: I sustain that objection.

MR. CORCORAN: Well, we're talking of the day of the accident, your Honor.

THE COURT: The objection is sustained.

MR. CORCORAN: "Question: And you or the Port Captain could tell them; isn't that so?"

THE COURT: Wait a minute. The objection is sustained.

MR. CORCORAN: Page 88.

"Q In the course of your conversation --"

THE COURT: If you look at that answer, Mr. Corcoran, that is not an answer. That is a speculative answer.

MR.CORCORAN: I respectfully submit, your Honor, that in language of this witness that it's for the jury to determine whether his answer is speculative or is it an affirmative answer.

THE COURT: I sustain the objection.

MR. CORCORAN: Exception.

Page 89.

"Q Mr. Maguilo, is there a fellow called Joe, the harbor master?

"A Yes. It's not a nickname, that is his job. He is a harbor master.

"Q Joe what?

"A Joe Geller.

"Q Was he there that morning?

"A Possibly. I'm not a hundred percent sure.

"Q Who employs Joe, the harbor master?

"A ITO.

"Q Is he different than the Port Captain?

"A He is different than the Port Captain.

"Q Yes?

"A Yes.

"Q What are the duties of Joe Geller, the harbor master? What are his duties?

"A He assists in the moving or placing or taking up of any waterborne objects, such as barges, cranes --

"Q In the placing of any waterborne objects, cranes, etc., and what else?

"A Lighters.

"Q Who does he assist in the moving of these waterborne objects? How does he do it?

"A In tying the rig, for instance, if the tugboat is using a crane alongside of the hatch to be worked, whatever hatch it may be, he assists in making it advance from the vessel to the crane.

"Q By means of the lines?

"A The hawsers.

"Q And things like that, right?

"A Yes.

"Q Does he physically do that, or does he oversee it and supervise it, or what?

"A He is physically involved himself.

"Q Well, the big hawser, he wouldn't pick up that himself physically, would he?

"A It's not that heavy.

"Q Would he do that in case of the R-5?

"A He may have. It may hve been him or it may have been somebody else.

"Q But he is a wholly different guy than this Port Captain that you have described?

"A Yes, sir.

"Q Now, again, so that I may know the distinction, what are the duties of the Port Captain, and I don't want to be repetitious.

"A The Port Captain I gave to you earlier.

"Q Sir, I'm a little mixed up.

"A It's in there. I gave it to you what he does.

"Q Just tell me briefly, maybe I can get the notion of it.

"A He plays the role of a representative for the steamship line, or the agent.

"Q I've got it now. When you were talking with Mr. McSweeney as to why the change from the single block to the double block --"

THE COURT: Just a minute, Mr. Corcoran. Again we have two questions in a row where the answers are completely inconclusive of anything. The second one even more than the first.

MR. CORCORAN: Do I understand your Honor is sustaining objections where the witness says possibly, or may have been?

THE COURT: Yes. Because that is speculative, and that is not evidence for the jury to consider.

MR. CORCORAN: I submit to your Honor that it is. That is the way a person talks. And that is certainly for the jury, I think. But, I will abide by your Honor's ruling.

THE COURT: All right.

MR. CORCORAN: "Question: Now, whose duty is it, the Port Captain or your job, to give the instructions to the crew of the R-5 as to what to pick up next or what piece of cargo? Was it you or the Port Captain or both of you, or either one?

"A It could be one of us."

Page 92.

"Q In other words, the scheduling of what lifts are to be made would come under your jurisdiction?

"A After the steamship gives us the final okay.

"Q Then it would come under your jurisdiction?

"A Yes.

"Q Are you aware, Mr. Maguilo, that there is aboard the R-5 a certificate showing the lifting capacity of the crane?

"A Yes, sir.

"Q And in accordance with federal law?

"A Yes, sir."

The bottom of page 93, your Honor.

"Q I understand. We are talking about an event three years ago and to the best of your recollection is all we are asking. Beyond that we are not asking anything.

Whose job, if you know from your experience, whose duty would it be to have the rig come in with the heaviest lifing capacity, knowing that the heaviest object to be picked up would be, would that be the ship, the R-5 people or the Port Captain or you or whose responsibility would that be?

"A Well, it's related to the crane people."

MR. BROWNE: Objection, your Honor.

THE COURT: What is the basis of the objection?

MR. CORCORAN: May I read, your Honor?

MR. BROWNE: The question is leading and the answer isn't really responsive.

THE COURT: I think it is. I will overrule it. Go ahead.

MR. CORCORAN: So that the jury may have the full context, can I start from the question, your Honor?

THE COURT: No, just start on line 23 on page 93, please.

MR. CORCORAN: "Question: Whose job, if you know from your experience, whose duty would it be to have the rig come in with the heaviest lifting capacity, knowing what the heaviest object to be picked up would be? Would that be the ship, the R-5 people or the Port Captain or you or whose responsibility would that be?

"A Well, it was related to the crane people. They asked the question so they know which crane to give.

B37 "Q In this case it would be the Rudolph people?

"A Yes, sir.

"Q In order to make this changeover, do they have to take the single block off? Isn't that so?

"A I guess so."

The bottom of page 95.

"Q Was it a fact, if I may refresh your memory --"

THE COURT: Well, just before you get into that, look at the answer on line 7 of page 96.

MR. CORCORAN: Yes, I see that, your Honor.

THE COURT: I know, but he is not saying that he has any recollection whatever of how they proposed to do it that way.

MR. CORCORAN: But he does say that would be the way, that's an answer.

THE COURT: I know, but we have the plaintiff here who told us exactly what happened. So I don't see that the other gentleman's testimony about a general recollection of practices would be --

MR. CORCORAN: Well, he does give a definitive answer. And since this is a question of credibility, your Honor, if I can get a supporting fact from an adverse witness that would support the plaintiff, I think that's proper. That's the whole purpose --

THE COURT: Whether it does any of those things is for the jury to determine. I will let you read the questions and answer.

MR. CORCORAN: Thank you, your Honor. Thank you.

"Q Was it a fact, if I may refresh your memory, if you have any recollection, that in order to make the changeover they had to lower the single block and from this hook of the single block pick up the double block which was on the deck of the R-5, and then swing it over to the dock itself and there make the change?

"A Again, that would be right."

MR. HOCKETT: Again, your Honor, I think we are getting into testimony that is cumulative, and this is the type of thing Mr. McSweeney has already explained.

THE COURT: I'm going to permit the next three questions and answers. Go ahead. "Answer: That would be right

MR. CORCORAN: "Answer: That would be right

"Q Is that right?

"A I don't know if it was done that way, but that would be the way.

"Q Then they would have to make the change on the dock itself? It would be more stable there, right?

"A Yes."

Page 97, there is one question, your Honor, at the bottom.

"Q Have you seen it being changed? Have you observed it in your 21 years of experience?

"A I may have."

THE COURT: Strike out the question.

MR.CORCORAN: So that the record may reflect, your Honor, do I understand it is because he says, "I may have"?

THE COURT: Yes.

MR. CORCORAN: That doesn't constitute an answer?

THE COURT: That is a speculation as to whether he did or didn't.

MR.CORCORAN: All right. So the record is clear, that is all, your Honor.

Omitting pages 99, 100, 101, 102, 103.

Page 104, your Honor.

"Q When you were given these various lifts, the stowage plan and so on, did these lifts contain weights to indicate what they were?

"A Yes.

"Q Well, they do have a material bearing in the course of loading or unloading the vessel?

"A Yes, sir.

"Q And in that connection you have told us that you worked jointly with the ship and as a representative of the terminal company, namely the ITO, following out the stowage plan?

"A Yes, sir.

"Q And in following out the stowage plan you seek to follow through and comply with the stowage plan as far as weights are concerned, that is one of the factors?

"A Yes, sir.

"Q Of course another factor, I think you will agree, is the size of the object that would take-up the space in the particular hold of the vessel; isn't that so?

"A Yes, sir.

"Q Now, therefore, with this background of importance and relevancy and materiality as to the loading of a vessel for sailing, safe sailing, and to enable the vessel to continue on its mission, I am asking you now, wasn't that the important factor that prompted you to ask Mr. McSweeney why the single block was not changed to the double block in order to lift up these 20 to 35-ton container

"A Yes, sir."

The balance of page 103 is omitted. Page 106 is omitted. Page 107 is omitted. Page 109 is omitted. Page 110 is omitted.

Page 111, your Honor, and I trust that I am following your Honor's orders --

THE COURT: Just read your questions.

MR. CORCORAN: "Question: Is the lifting up or the loading of the cargo the prime responsibility of ITO as a stevedore?

"A To maximum ship type.

"Q Is the loading of the cargo by means of the floating crane, in this case the R-5, was that a stevedoring operation?

"A It is part of the stevedoring operation, yes."

Bottom of page 111.

"Q Is it your duty as pier superintendent, or the duty of the Port Captain, to give instructions to the crew of the R-5 as to what piece of cargo is to be hoisted?

"A You are asking if it's my duty or the Port Captain's to direct the R-5 onto what piece of equipment is going to be loaded to the vessel?

"Q Right.

"A It is the duty of the stevedore.

"Q Which would be your duty?

"A Yes, sir."

The balance of that page is omitted, your Honor, and the rest of the testimony is examination by other counsel.

THE COURT: Do you gentlemen want to assess what parts of this you wish to read at this time?

MR. HOCKETT: I have nothing.

THE COURT: You have nothing to read?

MR. HOCKETT: No, your Honor.

MR. BROWNE: Nothing, your Honor.

MR. CAMPBELL: Well, Judge, I think there are a few items left out, and I just think maybe for completeness, I don't know if you want me to do it on my --

THE COURT: No, you have the right to do it now if you want to. The question was whether you wanted to do it at this time.

MR. CAMPBELL: I think just maybe about six questions and answers, your Honor, that were left out.

THE COURT: All right.

MR. CAMPBELL: Yes, sir.

THE COURT: Ladies and gentlemen, when one party has read the deposition, the adversary may read such parts that were not read as bearing on the cross-examination of the witness.

MR. CORCORAN: May I have a conference at the bench, your Honor?

THE COURT: Yes.

(At the side bar.)

THE COURT: Mr. Campbell, would you come up, please. This is not for the record.

(Discussion off the record.)

THE COURT: Ladies and gentlemen, I am going to excuse you for a couple of minutes and ask you to return to the jury room.

(Jury excused)

THE COURT: Mr. Campbell, you say there is one witness here that is here today and you would insist --

MR. CAMPBELL: I understand it is Mr. Browne's witness.

MR. BROWNE: I have Mr. Rudolph present today, your Honor.

THE COURT: Can he return? Mr. Corcoran does not feel well and I am going to recess the case for the balance of the day, and the only thing to do is to protect our posture here so that whoever will be --

MR. BROWNE: May I ask your Honor what further evidence Mr. Corcoran intends to offer?

THE COURT: He has two depositions.

MR. BROWNE: That's all?

THE COURT: That's all.

MR. CAMPBELL: One of which deposition I assume is the deposition of Mr. Rudolph which, your Honor, I will object to on the grounds, and I stated the objection in the deposition, I think it was on page --

THE COURT: Well, I don't know that that is a valid objection to a deposition. He is an adverse party and the deposition may be used for any purpose, then you may deal with it accordingly, as I understand the law.

MR. CAMPBELL: Well, if Mr. Corcoran --

THE COURT: If Mr. Rudolph is here I will just direct Mr. Rudolph to return on Monday, that's all there is to it.

MR. CAMPBELL: All right, your Honor.

THE COURT: Mr. Rudolph, I am afraid that circumstances do not permit us to continue this afternoon. Who is Mr. Rudolph? Is that you?

MR. RUDOLPH: Yes, sir, your Honor.

B37 THE COURT: I'm sorry to say that we will have to have you back. When would be convenient, Mr. Browne? Noontime on Monday?

MR. BROWNE: Mr. Rudolph does run a business.

MR. RUDOLPH: Noontime on Monday would be fine, your Honor.

THE COURT: Very good. We will stand in recess until 10:00 o'clock on Monday morning.

MR. CAMPBELL: Thank you, your Honor.

THE COURT: Mr. Corcoran, if you have any feeling for this over the weekend, go and do to these depositions what you have obviously done with the ITO deposition.

MR. CORCORAN: I will cut it down considerably.

THE COURT: Thank you very much. I'm sorry you don't feel well and I trust this will be of assistance.

MR. CORCORAN: Thank you, your Honor.

THE COURT: We will stand in recess until Monday.

(Adjourned until Monday, March 22, 1976 at 10:00 a.m.)

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cmcg 1

MICHAEL McSWEENEY

vs. 72 Civ. 1782

M. J. RUDOLPH CO., INC.,
M. J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE,
INTERNATIONAL TERMINAL
OPERATING CO., INC.

New York, New York
March 22, 1976

(Open Court - Jury present.)

THE COURT: Now, where were we as of Friday?

MR. CAMPBELL: Your Honor, Mr. Corcoran had not finished reading the deposition of Mr. Joseph Maguilo, and we were going to reread, but we will wait for the defendant's case.

THE COURT: Very good.

All right, Mr. Corcoran, go ahead.

MR. CORCORAN: At this time, if your Honor please, I am about to read the deposition taken of the defendants' Rudolph by James A. Rudolph, and in connection therewith I am asking your Honor's permission to permit me to remain seated.

THE COURT: Very good. Do you have an extra copy that I could have?

MR. CORCORAN: Yes, your Honor. That is the original copy (handing).

THE COURT: Thank you.

MR. CORCORAN: The deposition of James A. Rudolph taken by the plaintiff pursuant to notice dated July 31, 1972 was taken on the 16th day of August, 1973.

Present at this deposition were Messrs. Corcoran and Brady by William J. Corcoran, Attorneys for Plaintiff; Messrs. Fogarty, Nielson and McLaughlin and Semel,Attorneys for Defendant International Terminal Operating Company; Messrs. Kirlin, Campbell & Keating, Attorneys for the Defendant Yamashita Shinnihon, Messrs. D'Amato Costello and Shea, Attorneys for Defendants M. J. Rudolph and Company, and M. J. Rudolph Corporation,by Richard Browne, and present also was Mr. Michael McSweeney.

The witness James A. Rudolph having been duly sworn testified as follows. Examination by Mr. Corcoran:

"Q Mr. Rudolph, will you tell us your full name?

"A James A. Rudolph.

"Q You reside where?

"A 225 East 36th Street, Manhattan.

"Q Will you tell us, please, by whom you are employed?

"A M. J. Rudolph Corporation.

"Q In what capacity?

"A Vice president.

"Q Is there a defendant named in this action known as M. J. Rudolph Company, Incorporated?

"A Yes, they are.

"Q Are they the owner of the Rudolph Crane R-5?

"A Yes. And I am also employed by M.J. Rudolph Co., Inc., as --

"Q Also as a vice president?

"A Yes."

Line 12, your Honor. Line 10.

"Q Will you tell us the difference between the two corporations?

"A They are two distinct corporations.

"Q I understand.

"A That is the difference.

"Q I understand that, but what does the M.J. Rudolph Corp. have to do with the operation of the R-5 which is owned, as you say, by the M.J. Rudolph Company Inc.?

"A They operate for all practical purposes the R-5.

"Q And for how long have you been connected with the M.J. Rudolph Company Inc.and the M.J. Rudolph Corporation?

"A About 12 years.

"Q During those 12 years have you been vice president?

"J.A. Rudolph

"A No.

"Q How long have you been vice president?

"A Two years.

"Q Of each corporation?

"A Yes.

"Q And prior to that time what was your title, if any?

"A Secretary.

"Q How long were you secretary, approximately?

"A One year."

Line 17, your Honor.

"Q What is the business of the M.J. Rudolph Corporatio

"A The M. J. Rudolph Corporation is in the floating crane business.

"Q When you say floating crane business, what do they do with these floating cranes?

"A They discharge and load boat cargos, and also have heavy lifts."

THE COURT: Mr. Corcoran, this says bulk cargo. Have you got corrections here?

MR. CORCORAN: Yes, it should be bulk.

"A They discharge and unload bulk cargos and also make heavy lifts.

"Q When you say they load and discharge heavy cargo, would that be from the dock to the vessel, from the vessel to the dock?

"A Yes.

"Q Are you acquainted, Mr. Rudolph, with the plaintiff in this action, Mr. Michael McSweeney?

"A Yes.

"Q How long do you know him?

"A Approximately 8 years.

"Q And during those 8 years he has been employed by the M. J. Rudolph Corp.?

"A Yes, for the most part of it, yes.

"Q Tell us, please, in what capacity he has been so employed?

"A As a crane oiler, and at times as a crane operator."

Line 24, your Honor.

"Q Are you acquainted with an occurrence on November 14, 1970, where Mr. McSweeney suffered certain injuries?

"A Yes."

Line 8.

"Q Did you take him from the hospital to his home?

"A Yes, I took him from the hospital to his home."

At the bottom of page 9, your Honor, line 23.

"Q Now, in the course of this R-5 by whom was that engaged, was that engaged by the Yamawaka Maru or by the cmcg 6 "J.A. Rudolph

Yamashita Shinnihon Lines, or was it engaged by the ITO?

"A It was engaged by the Yamashita Shinnihon Line."

Line 14, your Honor.

"Q With whom did you deal in the Yamashita Shinnihon Line?"

There is an objection.

MR. CAMPBELL: There is no answer to that.

MR. CORCORAN: No answer.

Line 22.

"Q Do you have any records in your office that would indicate it?

"A Yes."

Page 11 is omitted, your Honor. Page 12, Mr. Corcoran, the question that was read back is who at Yamashita Shinnihon Line did he deal with?

MR. HOCKETT: Would you tell us what line you are reading from now?

MR. CORCORAN: Yes, line 3 on page 12.

THE COURT: Just go to the answer on line 8.

MR. CORCORAN: "A As far as specifically who I spoke to I am not sure at this time. I believe to Sal Agro whom I understand works for the Agent of the Yamashita Shinnihon Line.

"Q What is the name of the agent?

"A Texas Transport and Terminal.

"Q Where is Texas Transport and Terminal located?

"A I don't know their exact location.

"Q Well, do you know in what state?

"A New York.

"Q New York City?

"A Yes."

Page 13, line 4.

"Q Did he ask for a floating crane?

"A Yes,he might have."

The rest of that page is omitted, your Honor, and we go to page 14 line 8.

"Q Was a particular type of crane requested of the Rudolph Company in connection with the work to be done by the Yamawaka Maru on November 14, 1970?

"A I believe so.

"Q How many floating cranes does Rudolph Company have?

"A Five.

"Q Just briefly what are their designations?

"A The R-1, R-4, R-5, R-6 and R-12.

"Q Are these various floating cranes approximately the same size and dimensions, or is one bigger than the other, or what?

"A Approximately the same size as far as dimensions.

cmcg 8 "J. A. Rudolph

"Q Would they have the same lifting capacity?

"A No."

Page 15, Line 5. Line 4, rather.

"Q Are these diesel powered cranes?

"A Three are diesel powered and two are steam.

"Q Which are diesel powered?

"A The R-5, R-6 and R-12.

"Q The R-1 and R-4 are steam powered?

"A Yes.

"Q Oil or coal?

"A Coal."

The rest of the paragraph and the rest of the page is omitted, your Honor. Go to page 16, line 19.

"Q When the Rudolph Company was requested to furnish a floating crane who made that request? Was it ITO or the Shinnihon Line?

"A I believe I said before it was Sal Agro.

40 "Q And who is he representing?

"A He was representing, I believe, Yamashita Shinnihon.

"Q When Mr. Sal Agro requested on behalf of the Shinnihon Line, or the Rudolph Company to furnish a floating crane, did he specify the type of crane that he wanted, or that the Yamashita Shinnihon Line wanted?

"A It would have been discussed, yes.

"Q And what would be the nature of the discussion?

"A The nature of the discussion would be the weight of the lift and the reach that would be required.

"Q And to the best of your knowledge, Mr. Rudolph, what weight to be lifted was discussed?

"A For which day, sir."

MR. CAMPBELL: Your Honor, may we have a side bar on this, please.

THE COURT: All right.

(At the side bar.)

MR. CAMPBELL: Your Honor, this is what I discussed with you on Friday, that this deposition was taken of Mr. Rudolph without records. The records were subpoenaed by Mr. Corcoran with this court on Friday which would indicate that as is shown on page 75 when Mr. Rudolph re-read this deposition with the use of records, the information that he has given here was given to the best of his knowledge without the use of records. But on page 75 he changed to 50,000 pounds.

This questioning that Mr. Corcoran now is eliciting seems to indicate that he is under the misapprehension that it was 30,000 pounds that was requested.

Now, the objection was made on page 18, your Honor, when we got to Mr. Rudolph, he doesn't remember even who spoke to him, he doesn't remember specific conversation, he doesn't remember whether it was with him or with his father, and he doesn't remember, but he said that if it were a specific conversation this was what would have happened.

THE COURT: Yes. All right.

MR. CORCORAN: We have the right to read the answers of the witness, and if Mr. Campbell believes that they should be corrected he can put him on the stand.

MR. CAMPBELL: But what you're doing is --

THE COURT: No, Mr. Corcoran, would you dispute the fact that at page 18 at the bottom Mr. Rudolph indicates that he has no recollection of this conversation at all? He is trying to reconstruct it? Would you concede that?

MR. CORCORAN: Your Honor, I think --

THE COURT: No, just let me ask you that. Do you concede that at line 22, page 18, he answers that he does not recall the conversation that was either with himself or with his father or -- do you concede that?

MR. CORCORAN: I don't read that. I omit that.

MR. CAMPBELL: But that's the whole thing.

MR. CORCORAN: It's not evidence until I read it in, your Honor. And this is wholly --

THE COURT: I have a right to look at this record and I have the right as the judge to see to it that the jury gets things properly before it, and just because you choose to omit something I can make a determination as a matter of a foundation for a question that Mr. Rudolph has no recollection of this conversation and therefore I will exclude it.

So the objection is sustained.

MR. CORCORAN: Let me have, for the record, I'm objecting to the entire manner in which the court is permittin proof on behalf of the plaintiff to be submitted. On the testimony of the witness Maguilo where you said that --

THE COURT: No, Mr. Corcoran, I am not going to listen to this now. We are in the middle of reading this. I am going to sustain the objection because thereis no foundation for this testimony.

The man has said in the course of his deposition that he doesn't recall a conversation, therefore there is no point in letting you read speculative testimony about it.

MR. CORCORAN: That's not true, your Honor. This witness was asked this several times.

THE COURT: I will read into the record that he is saying that he does not recall the conversation and his answer is exactly, and that is lines 22 and 23 of page 18 --

MR. CORCORAN: I submit, your Honor, it is inappropriate for the court to read anything into this record.

cmcg 12

THE COURT: All right.

(In open court.)

MR. CORCORAN: "Q For the loading of the Yamawaka Maru --"

THE COURT: This is on line 13 at page 17?

MR. CORCORAN: Yes, sir.

THE COURT: I sustained an objection to this line of questioning going into this conversation for the reasons I put on the record at the side bar.

MR. CORCORAN: At this time, if your Honor please, I want the entire deposition of James A. Rudolph marked for identification.

THE COURT: It is before the court, so it is a matter of record and can be referred to by you at any appropriate time, but you can't have the answers to these questions. The objection is sustained.

MR. CORCORAN: Well, will the reporter at this time reflect on his notes --

THE COURT: No, no, Mr. Corcoran.

MR. CORCORAN: (Continuing) that I am offering the deposition --

THE COURT: Mr. Corcoran, please be seated, sir. Be seated and continue with the reading of questions from this deposition which you feel are relevant. Obviously

"J. A. Rudolph

excluding the ones that I have sustained an objection to. Go on, please, beyond the conversation for the hiring of the R-5 as to which this witness has said he does not have a recollection. Let's go beyond that. Pick up the thread.

MR. CORCORAN: If your Honor please, may I remain seated while I address the court?

THE COURT: You may. Please do.

MR. CORCORAN: On page 17, line 22, that's a different question altogether as to, not to weight, but may I read that question? Line 22.

THE COURT: Hold on now.

MR. CAMPBELL: There is no answer to that question, your Honor.

THE COURT: No, there isn't an answer.

MR. CORCORAN: All right, page 18, line 13.

THE COURT: No, the objection to that question is sustained.

MR. CORCORAN: May I have an exception, your Honor?

THE COURT: You do.

MR. CORCORAN: On page 19, line 13.

"Q Tell me, when was the first day that the Rudolph Company furnished a crane in connection with the loading of the Yamawaka Maru?

"A November 13, 1970.

cmcg 14 "J. A. Rudolph

"Q Was that the R-5?

"A Yes. "

Page 20 is omitted.

Page 21, line 11.

"Q The question was, when the R-5 was furnished by the Rudolph Company to whom was it furnished? You said it was the Shinnihon Line?

"A Yes.

"Q Where was the R-5 delivered?

"A Pier 6, Port Authority.

"Q Well, who on behalf of the Rudolph Company was present?

"A Nobody."

Line 9.

"Q It would be delivered during the night and would be unmanned?

"A It would probably be delivered during the night and unmanned?

"Q During the night say, when, November 13?

"A The early morning of the 13th, possibly, yes.

"Q Where was it delivered from?

"A Port Newark.

"Q And when it was delivered to Pier 6 tell us when operations with respect to the R-5 commenced?

"J. A. Rudolph

"A I'm not sure when the operations commenced. I believe they were ordered to start at 8 a. m.

"Q Of November 13?

"A Yes, but I'm not sure.

"Q Who gave this order? Is that order from the Rudolph Company?

"A The order to start work would be received from the customer. He would order a starting time.

"Q Would that be the Shinnihon Line?

"A In this case, yes.

"Q Do you know who in the Shinnihon Line gave the order to start work at 8 a. m. on the morning of --"

THE COURT: If you will look ahead, Mr. Corcoran, there is no answer to any of these questions.

MR. CORCORAN: If your Honor please, there is an answer, if the answer given is stated there. That's for the jury --

THE COURT: Yes, but if he is asked, do you know, and he said no --

MR. CORCORAN: That's an answer. I submit, your Honor, that is an answer as much as yes would be an answer, and it is for this jury to determine the value of it.

THE COURT: What are they going to determine from that?

cmcg 16 "J. A. Rudolph

MR. CORCORAN: Whatever they feel they want to determine. These are fact questions, your Honor, and I disagree respectfully with the court in denying me the right to read an answer where the answer says, I don't know, or maybe, or, possibly, or, no. These are answers.

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THE COURT: You can have these answers here. I don't see that they are of any assistance to the jury.

MR. CORCORAN: They may not be.

THE COURT: But I will let you read them. In the interest of time I thought we could omit some of these where he says he doesn't know something.

MR. CORCORAN: That sometimes is factual in determining a question.

THE COURT: You are sometimes correct. Go ahead.

MR. CORCORAN: Yes, sir.

At line 10.

"Q Would it be an officer of the crew of the Shinnihon Line?

"A No.

"Q Then who would it be from?

"A Generally it would be Sal Agro.

"Q Where does Sal Agro have his office?

"A Pier 6, Port Authority.

"Q And he was an employee of the Texas Transport and

Terminal Port Company?

"A Yes.

"Q And that company was an agent for the Shinnihon Line?

"A Yes.

"Q When the R-5 commenced work on the morning of November 13, 1970 at about 8 a. m., do you know how it was rigged up with respect to the lifting capacity?

"A Yes.

"Q Tell us please what was the lifting capacity on the morning of November 13?"

MR. CAMPBELL: Your Honor, I have already objected to that.

MR. CORCORAN: Here he has a yes answer.

MR. CAMPBELL: Your Honor, he already mentioned that he didn't recollect.

MR. CORCORAN: Your Honor, we are going to the weight of the evidence. I say again respectfully that if this witness answers a specific number of tons it is for this jury to determine and he can vary it by taking the stand himself.

THE COURT: Just a minute now. Just a minute.

MR. BROWNE: Your Honor, I must ask that counsel's comments be stricken.

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THE COURT: Yes. Strike those comments from the record. The jury has been instructed, and I will instruct you again, that comments of counsel are not evidence. It is only the answers to questions that are evidence.

MR. CORCORAN: Well, is my argument to you on the validity --

THE COURT: It is not evidence.

MR. CORCORAN: No, no, but I mean is my argument stricken?

THE COURT: All right, argument is stricken to the extent it constitutes evidence.

Now, gentlemen, come up here.

(At the side bar.)

THE COURT: It seems to me, I want to find out what is the basis for your objection, but it seems to me that he has made a fact statement of its lifting capacity as of a particular morning. It has nothing to do with the arrangements, it has to do with what existed.

MR. BROWNE: I think it is undisputed, isn't it?

THE COURT: He may very well know it could pick up 18 short tons, now what is the objection to that question?

MR. HOCKETT: Well, your Honor, for one thing --

THE COURT: I am not so sure that --

MR. BROWNE: It's true, so what's the --

THE COURT: I am not clear why there was an objection from the vessel on this question. I want to be sure what we are talking about.

MR. BROWNE: This doesn't indicate that he knew that at the time.

MR. CORCORAN: It sure does.

MR. HOCKETT: That's exactly what --

MR. BROWNE: He knew at the time of the deposition, but not on November 13.

MR. CORCORAN: We are arguing minuscule --

THE COURT: Unless there is a good reason I am going to overrule the objection to that question.

(In open court.)

THE COURT: The objection is overruled. You may have an answer.

MR. CORCORAN: "Q Tell us, please, what was the lifting capacity on the morning of November 13?

"A 18 short tons.

"Q Will you tell us, please, the difference between a short and a long ton?

"A A short ton consists of 2,000 pounds, a long ton consists of 2,240 pounds."

At the bottom of page 24, your Honor, line 23.

"Q Does the Rudolph company have any written record of this transaction in the forms of bill of sale or what?

"A Yes."

THE COURT: Do you have that at this point? Do you have that invoice or bill of sale at this point?

MR. BROWNE: We have an invoice, your Honor.

THE COURT: Do you offer it in evidence?

MR. BROWNE: Here is the invoice, your Honor. There is also, it came to me with a rate schedule, and there is also a covering letter to me that I will leave attached for the sake of identification.

Excuse me, is it being rejected?

MR. CORCORAN: I have not offered it.

Page 27, your Honor, line 5.

"Q When does the Rudolph Company become informed as to the nature or weight or size of the cargo to be hoisted aboard the vessel?

"A When the crane is ordered.

"Q When the crane was ordered in this case it was, I believe you told us, the day before, November 13?"

MR. CAMPBELL: There is no answer to that, your Honor, and that is an incorrect statement.

THE COURT: No answer.

MR. CORCORAN: All right. Line 18.

"Q Well, it had to be before the 13th, did it not?

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"A Generally speaking, yes."

Page 28, line 14.

"Q Was it ordered the week ago prior to that time, or a day before?

"A I think it might have been.

"Q It might have been a week?

"A Yes."

The balance of page 28 is omitted. Page 29 is omitted. Page 30 is omitted. Page 31 is omitted up to line 23.

"Q When this order came into the Rudolph Company to furnish or deliver a crane with a lifting capacity of 18 short tons, did the Rudolph Company then select the R-5?

"A Yes."

MR. CAMPBELL: Your Honor, objected to that before because there is no testimony that that was the order he took because he was not the one who took the order.

THE COURT: I will allow the answer to stand. Obviously a crane was ordered and Rudolph delivered the R-5.

MR. BROWNE: It is a faulty question, I think.

MR. CAMPBELL: With a lifting capacity of 18 tons.

THE COURT: Lifting capacity of 18 short tons, yes, I will strike that question out. No foundation for that. Strike out the answer.

May I see that exhibit that was marked for identification, please?

MR. CORCORAN: At this time it's not marked at all, your Honor.

THE COURT: It should be marked.

MR. CORCORAN: Even though we don't choose to identify it, your Honor?

MR. BROWNE: I have identified it, your Honor.

MR. CORCORAN: Then I respectfully submit it should be a defendant's exhibit.

THE COURT: Go ahead.

XXX (Plaintiff's Exhibit 9 marked for identification.)

MR. CORCORAN: On page 32, line 11.

"Q But you have already testified, as I recall, and my notes reflect that, on November 13, 1970, at 8 a. m. it was delivered a crane with a lifting capacity of 18 short tons which you translated into 2,000 pounds short tons; do you remember that?"

THE COURT: The objection is sustained.

MR. CORCORAN: "A Yes."

THE COURT: The objection is sustained, the answer is stricken.

MR. CORCORAN: Again, respectfully, your Honor, will the --

THE COURT: Now just go forward, sir. Just go forward. This point has been fully argued. Just go forward.

MR. CORCORAN: "Q At the time that the request for a floating rig or crane was made by Mr. Sal Agro did Mr. Agro inform you, the Rudolph Company, the nature of the cargo that was to be put aboard the vessel?"

MR. HOCKETT: Your Honor, that is --

MR. CAMPBELL: Your Honor, I --

THE COURT: The objection is sustained. The answer is not an answer.

MR. CORCORAN: Your Honor, for the same grounds I except, your Honor.

THE COURT: Very good. The exception is noted.

MR. CORCORAN: Is that because the man assumes --

THE COURT: The exception is noted.

MR. CORCORAN: Yes, but I want to --

THE COURT: The exception is noted, sir. I don't want further argument. We have argued this point already.

MR. CORCORAN: Page 33 is omitted. Page 34 is omitted. Page 35, 36.

On page 37, line 15.

"Q What was the order for the furnishing of this crane? What did it consist of?"

42 THE COURT: Isn't that more of the same?

cmcg 24

MR. HOCKETT: Yes, your Honor.

THE COURT: Yes. The objection is sustained.

MR. CORCORAN: Your Honor, so that I don't read and have an objection by counsel or your Honor, willyou tell me how far I may read?

THE COURT: You will have to indicate to me which questions --

MR. CORCORAN: Then I will continue until you tell me that it is sustained.

THE COURT: All right.

MR. CORCORAN: Because the record --

THE COURT: All right. Go ahead.

MR. CORCORAN: All right.

May I for the record, your Honor, have deemed as an offer of proof page 37, commencing with line 15 to page 38 up to line 9? So I don't read it, following your Honor's ruling.

THE COURT: You may ask the question on line 25 and the answer on page 38 line 4.

MR. CORCORAN: What I am asking, your Honor, can it be deemed --

THE COURT: No. I am saying to you if you are going to offer that as proof I will permit you to read the question at line 25 --

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MR. CORCORAN: I want to be careful not to violate your Honor's ruling.

THE COURT: All right, go ahead.

MR. CORCORAN: On the bottom of page 37, Line 25.

"Q And was the R-5 rigged up with a capacity of 15 tons?

"A No, it was rigged with a capacity for 18 short tons.

"Q That is what I thought."

MR. BROWNE: Your Honor, no one has ever denied that.

THE COURT: Yes. Strike that out. And the answer at line 9 is not an answer, so that question is objectionable.

Do you have an offer of proof of anything else on that page?

MR. CORCORAN: Well, I am going to offer it for evidence, that is an offer of proof, line 20.

"Q Is it the practice of anyone from the Rudolph Company to make a visual inspection of the cargo to be lifted?

"A No. "

On page 39.

"Q Well, do you know that there was cargo in excess of 18 tons to be lifted?

"A I know that on the 13th there wasn't, but on the

14th there was."

The rest of that page is omitted. Omit page 40. Page 41 omitted. Page 42 omitted.

Line 15.

"Q Now, does the Rudolph Company have any records that on the 14th of November there was a cargo in excess of 18 tons to be lifted?

"A Yes.

"Q Do they have a record of that?

"A Yes.

"Q What is the nature of that record?

"A An invoice."

The balance of the page is omitted.

Page 44 omitted. Page 45 omitted.

Question on page 46, your honor, line 7.

"Q I may have misunderstood you, Mr. Rudolph, I am sorry. How was it billed on the 13th of November?

"A It was billed --"

MR. CAMPBELL: Your Honor, I object to that in that it is contrary to the invoice.

THE COURT: Wait a second now. Wait a minute.

Well, the problem that you have, Mr. Corcoran, is that you are going to have to go back some distance here. There is no foundation for that question. How far back dc you want to go?

MR. CORCORAN: Well, perhaps on page 45 line 20. May I read that? That might be --

THE COURT: Yes.

MR. CORCORAN: (Continuing) an integral part of the question.

THE COURT: Yes.

MR. CORCORAN: "Q Was a billing by the Rudolph Company billed in two sections, one for work done on the 18 ton capacity and one for work done on the capacity in excess of 18 tons?

"A No, it was billed on the weight lifted for each particular day.

"Q So then on the 13th it was billed on the weight up to 18 tons?

"A No.

"Q I may have misunderstood you, Mr. Rudolph, I am sorry.

"How was it billed on the 13th of November?

"A It was billed on the actual weight that was lifted on the 13th which would be 30,000 pounds.

"Q 30,000 pounds or 15 tons; right?

"A Yes.

"Q Now, the 14th what was the billing based on?

"A 50,000 pounds.

"Q Or 25 tons?

"A That's correct.

"Q Short ton?

"A Yes.

"Q Did this cargo which was in excess of 30,000 pounds or 15 tons, did this consist primarily of containers, stuffed containers?

"A I assume so."

On page 47, line 6.

"Q Well, in the course of your employment, or work, for both M. J. Rudolph Company, Incorporated and --"

THE COURT: Mr. Corcoran, let me stop you a minute. Is this an area in which there was any dispute?

MR. CORCORAN: I think it goes to the duty of the defendant to become informed of the weights and, therefore, I think it is very, very relevant and material.

THE COURT: All right, go ahead.

MR. CORCORAN: "Q In the course of your employment, or word, for both M. J. Rudolph and Company, Incorporated, and M. J. Rudolph Corporation, have you had occasion to visit dock sides to see these containers? You are familiar with them, are you not?

"A Yes.

"Q Do these containers have a tag on them to show what the weights are?

"A Yes, generally.

"Q And are they pasted on the container, or put on the wire, or how?

"A Both methods they use.

"Q And did any representative of the Rudolph Company go to the farm area or to the dock side to inspect the tags that these containers have on them?

"A They probably would.

"Q Do you do that yourself, Mr. Rudolph?

"A I have done it, yes.

"Q And is that to make certain that the lifting capacity of the crane would not be exceeded?

"A Yes.

"Q Now, there has been some testimony that on board the R-5 there was a certificate showing the lifting capacity in accordance with some federal governmental rules; is that so?

"A Yes.

"Q And you are acquainted with that certificate?

"A Yes.

"Q And is that as a result of an annual inspection?

"A Yes."

"J. A. Rudolph

The rest of that page, your Honor, I am omitting.

I am omitting page 49. Omitting page 50 up to line 12.

"Q Does the Rudolph Company or corporation have a rule prohibiting the lifting of a load in excess of the lifting capacity of the crane?

"A Yes."

On page 59, line 12.

"Q Is it the custom and practice that a party who is renting the crane to inform the Rudolph Corporation as to the maximum lifting capacity it requests?

"A Yes.

"Q And in this case --"

THE COURT: Well, the answer is I don't recall, so there is no point in reading the question.

MR. CORCORAN: Well, my exception for the same reason, your Honor.

THE COURT: No, I will permit it. Overruled. You may have an answer. Go ahead.

MR. CORCORAN: "Q And in this case will you tell us please if the Rudolph Company or corporation ever received any information from the Shinnihon Line that the cargo that was to be lifted would be in excess of 15 or 18 tons?

"J. A. Rudolph

"A I don't recall.

"Q Does the pier superintendent give instructions to the crew of the Rudolph floating rigs when they are working?

"A Yes.

"Q In other words, they are required to take orders from the pier superintendent?

"A Yes."

MR. HOCKETT: Well, I'm going to object to the form of the question. I don't think it has been explained what orders and what authority they have. Certainly not by Mr. Rudolph.

THE COURT: Well, I think the plaintiff put that in perspective in his testimony here the other day. Go ahead, Overruled.

MR. CORCORAN: Page 53.

43 "Q Do you know if the crew of the floating rigs of the Rudolph Company, particularly the R-5, are required to take orders for changing blocks from orders given to them by the pier superintendent?

"A In some cases, yes."

MR. HOCKETT: Again, note my objection, your Honor.

THE COURT: Yes. Overruled.

MR. CORCORAN: There was no objection made at the time of the deposition.

cmcg 32 "J. A. Rudolph

"Q Since you qualified that 'in some cases' in what cases do they?

"A When it is pointed out that the lifting exceeds the capacity that they are rigged for, they have the authority to go ahead and re-rigand make it known to the office at a later date.

"Q Is there an additional charge for that re-rigging?

"A It could be."

The rest of that page is omitted.

Page 54 is omitted, up to line 19.

"Q Did he make any reference to the fact that the pier superintendent, Mr. Joe Chuck, was hollering and screaming at him as to why the block was not changed the day before?"

MR. HOCKETT: I am going to object.

MR. CORCORAN: Mr. Browne says, "he may answer it." Your Honor, on page 55, Mr. Browne --

THE COURT: Wait a minute now. Wait a minute. What is the question that is objected to? Line 19?

MR. HOCKETT: If nothing else, as to form, your Honor. It is line 19 on page 54.

MR. CORCORAN: On page 55, your Honor, Mr. Browne--

THE COURT: Hold on now.

MR. CORCORAN: All right.

THE COURT: No, overruled. Go ahead.

MR. CORCORAN: May I read the question again to get the context?

THE COURT: All right.

MR. CORCORAN: "Q Did he make any reference to the fact that the pier superintendent, Mr. Joe Chuck, was hollering and screaming at him as to why the block was not changed the day before?

"A Being three years ago I'm not certain, but I believe that Mr. McSweeney did mention something about the fact that this did take place."

Page 55, line 7.

"Q When you say that this did take place you mean that he was shouted at and hollered at and criticized by Joe Chuck, the pier superintendent?"

MR. HOCKETT: Note my objection, your Honor.

THE COURT: Yes. Ovarruled.

MR. CORCORAN: "A I don't know if it was as you put it, but I do remember that Mr. McSweeney did mention that Mr. Chuck did have words with or at Mr. McSweeney.

"Q Sort of bawling him out."

THE COURT: Yes, objection as to form is sustained.

MR. CORCORAN: "Q Did Mr. McSweeney inform you that Mr. Maguilo, otherwise known as Joe Chuck, had sworn at him and used obscene language?"

MR. HOCKETT: Objection, your Honor.

THE COURT: Objection is sustained.

MR. CORCORAN: "Q Did Mr. McSweeney tell you in words or substance that Mr. Joseph Maguilo, otherwise known as Joe Chuck, was breathing down his neck?"

MR. HOCKETT: Again, objection.

THE COURT: Yes. Overruled.

MR. CORCORAN: "A As I said before, I understand from Mr. McSweeney, or understood from Mr. McSweeney, that Joe Chuck did have words and did inform him of his displeasure.

"Q For not having the rig changed from a single to a double block?

"A That's correct."

Page 57 is omitted. Page 58 is omitted. Page 59 is omitted. Page 60 is omitted.

Excuse me, your Honor, on page 60 I would like to read from line 12.

"Q Did there come a time when you went to, was it to the Jewish Memorial Hospital, to take Mr. McSweeney home?

"A I think it was the Long Island.

"Q I'm sorry, Long Island College Hospital?

"A Yes, I believe so.

"Q Yes, I think you are correct. And you had been informed that he was in the accident at what hospital;right?

"A Yes.

"Q Then you took your car, did you?

"A Yes.

"Q And drove to the hospital?

"A Yes.

"Q Will you describe the condition as you recall that Mr. McSweeney was in?

"A I believe, in fact I'm sure it was the emergency room, and I remember Mr. McSweeney sitting waiting possibly before or after treatment complaining that his back was hurting him severely.

"Q And from your observation of Mr. McSweeney at that time did it appear that he was in pain?

"A Yes.

"Q And he had been helped to your car from the hospital?

"A Yes.

"Q And did you assist him?

"A Yes.

"Q And then you drove him to his home in New Jersey?

"A That's correct.

"Q And while you were driving him home did he complain of pain in his back?

"A Yes.

"Q And did his facial expression indicate that he was in pain?

"A Yes."

Page 62 is omitted, your Honor. Page 63 up to line 16.

"Q And do you have personal knowledge that when he returned to work on light duty schedule that he wore a brace on his back?

"A I had personal knowledge that he did wear a brace?

"Q And you saw it?

"A Yes."

On the bottom of page 63, line 25.

"Q And were there occasions when he had overtime?

"A Certainly."

The rest of that page is omitted, and the rest of page 65 is omitted, and that concludes the examination by the plaintiff.

THE COURT: All right.

MR. CORCORAN: I think, your Honor, I conformed with your Honor's ruling as best as I could.

THE COURT: Very good. Do any counsel for defense want to read any portion of this deposition?

MR. HOCKETT: Not ITO, your Honor.

THE COURT: Mr. Browne?

MR. BROWNE: May I have just a minute, Judge?

THE COURT: You may.

MR. BROWNE: No, I don't think so, Judge.

THE COURT: All right. Mr. Campbell?

MR. CAMPBELL: Yes, your Honor, I would just like to read two items, if I may?

THE COURT: Very good.

MR. CAMPBELL: This is on page 66, line 13.

"Q Now, do you personally recall having spoken to anyone concerning the ordering of the R-5 rig for the Yamawaka Maru in November of 1970?

"A No, although I could have, I don't recall."

On page 67, line 6.

"Q Specifically you recall nothing; is that right?

"A As far as the actual ordering, I do not recall whether I took it myself or whether it was received from Sal Agro."

Line 10 --

MR. CORCORAN: If your Honor please, that was a question by Mr. Browne.

THE COURT: All right.

MR. CORCORAN: And Mr. Browne chose not to read it.

THE COURT: Well, the deposition can be used by any party consistent with the rules. Go ahead.

MR. CAMPBELL: And on line 10, question by myself:

"Q You don't recall having spoken to Sal Agro pertaining to this particular occasion?

"A Specifically, no.

"Q And you don't recall the order being made for a certain capacity for the R-5?

"A No.

"Q And in fact, what is the maximum capacity for the R-5, sir?

"A 45 short ton."

MR. CORCORAN: Excuse me, Mr. Campbell. Consistent with your prior orders, your Honor, where the witness says he doesn't recall, I ask that that question and answer be stricken to be consistent with your prior rulings.

THE COURT: He doesn't recall what?

MR. CORCORAN: He says, you don't recall, and he says, no.

THE COURT: Doesn't recall what?

MR. CORCORAN: Well, the question is on page 10, "You don't recall having spoken to Sal Agro pertaining to this particular occasion?

"A Specifically no."

4 THE COURT: No, but the question that is asked here is his knowledge of the actual capacity of one of his

vessels and it has nothing to do with any conversation about anybody or its use.

The objection is overruled.

MR. CORCORAN: Well, now, your Honor, in the next question it's the same question that's asked --

THE COURT: I have sustained an objection to that.

MR. CORCORAN: That's sustained.

THE COURT: If that were asked. I don't know if it is going to be asked.

MR. CAMPBELL: No, your Honor, I am on another page now. On page 68, line 15.

"Q Now, is it unusual, sir, to change the rigging of the R-5 from a single to a double block?

"A No."

On page 74, line 25.

"Q In addition to the entry as to who called in, would an entry in a log be made as to the maximum load to be put aboard the ship?

"A It may or may not."

MR. CORCORAN: Excuse me. I make the same objection because his answer may or may not is in the same tenor as your Honor's objection to prior questions where the witness says maybe, possibly --

MR. CAMPBELL: Your Honor, the only reason --

THE COURT: I don't see where we are.

MR. CAMPBELL: Page 75, your Honor. The only reason that question was asked was for the next question, your Honor, which the witness filled in after looking at his records.

MR CORCORAN: But I would like to have a ruling on the question on the bottom of the --

THE COURT: No, that is a practice of the firm. The objection is overruled.

MR. CORCORAN: Is that on page 74, your Honor?

THE COURT: The objection to that is overruled.

Go ahead.

MR. CAMPBELL: "Q Again I will leave a space and ask you if there is any reference made to the maximum load, to please fill it in.

"A Yes."

A line is left and "50,000 pounds" is subsequently written in in pen.

Your Honor, on page 57, the top of the page, line 3.

"Q At least were you ever informed by the Shinnihon Line or by ITO that there was to be a lift in excess of 18 tons?"

MR. CORCORAN: Objection on the ground --

THE COURT: Yes, I think I will sustain that objection. It is speculative. The objection is sustained.

MR. CAMPBELL: Nothing further, your Honor.

MR. HOCKETT: I have nothing further, your Honor.

THE COURT: All right. Mr. Corcoran.

MR. CORCORAN: Yes, your Honor. I believe I had given you Friday, your Honor, the original deposition of Dr. Cook.

THE COURT: You did.

MR. BROWNE: I have an extra one, your Honor; one was delivered to my office.

THE COURT: I have one here.

All right, we are all set.

MR. CORCORAN: I am now about to read the deposition of Dr. Jerome I. Cook, taken pursuant to notice, dated March 15, 1976, at the Westfield Orthopedic Group, 541 East 4th Street, Westfield, New Jersey, on the 17th day of March, 1976.

Present were Corcoran and Brady by William J. Brady, Attorneys for Plaintiff, and the firm of D'Amato, Costello & Shea, by Richard C. Browne, for Defendants Rudolph, and the firm of Kirlin, Campbell & Keating by James Campbell for Defendant Yamashita, and the firm of McLaughlin & Semel by Mr. McLaughlin, for the defendant ITO.

The witness having been sworn, testified as follows:

"Examination by Mr. Corcoran:

"Q Are you a physician and surgeon duly licensed to practice in the State of New Jersey?

"A Yes, sir.

"Q Where is your office for the practice of your profession?

"A 541 East 4th Street, Westfield, New Jersey.

"Q Will you tell us, please, what is your medical education?

"A I graduated from the Jefferson Medical School in 1954 in Philadelphia and I interned at the Beth Israel Hospital during 1955 and went back to Jefferson for four years of residency through 1959 and then spent two years on the orthopedic surgery staff at the Philadelphia Naval Hospital and then came out into private practice in New Jersey which has been my home.

"I am a member of the American Academy of Orthopedic Surgeons and a member of the Board of Orthopedic Surgery.

"Q Doctor, are you attached or acquainted with the Westfield Orthopedic Group?

"A Yes, sir, I am a member of the Westfield Orthopedic Group.

"Q What is the Westfield Orthopedic Group?

"A It is an association of five physicians for the practice of orthopedic surgery.

"Q Are all of these five doctors engaged in orthopedic surgery?

"A Yes, in orthopedic surgery.

"Q What hospitals are you attached to?

"A We are attached to two hospitals; Overlook Hospital in Summit and The Hospital for Crippled Children right here in Westfield.

"Q Have you written any professional papers, Doctor?

"A Yes, I have.

"Q What papers have you written?

"A Well, primarily associated with acromioclavicular joint problems. Primarily associated with research and leg length. Stimulation in animals in conjunction with formal procedures.

"I have written papers with regard to various surgical procedures and with transplantation of femoral heads on animals before we had artificial devices.

"Q You have a specification of bony flares of pain on acromioclavicular separation. What is that clavicular joint problem that you mentioned?

"A It has to do with the small joint on the top of the shoulder which is injured in certain athletic events, et cetera.

"Q Is that connected with the clavicle?

"A Yes, sir.

"Q Are you a member of any medical societies, Doctor?

"A I am a member of the American Medical Association, the New Jersey Medical Association, Jefferson Orthopedic Society, and there is also the New Jersey Orthopedic Society, also, of which I am a member.

"I suppose there are some others where I cannot think of right now.

"Q Are you acquainted with Mr. Michael McSweeney who is the plaintiff in this action?

"A Yes, I am.

"Q Had he been referred to you by Dr. John Gudelisdo?

"A Yes, he was.

"Q Are you acquainted with Dr. John Gudelisdo?

"A I am acquainted with him in that he refers patients to our office. I have never met the man personally.

"Q Do you have your records with you?

"A Yes, I do.

"Q Would those records be made in the regular course of your business as a physician?

"A Yes, they would.

"Q Doctor, tell us when you first became acquainted with Mr. McSweeney on him being referred by Dr. Gudelisdo?

"A The first acquaintance was on 11/1/70.

"Q At that time, Doctor, had Mr. McSweeney given you a history of an accident that had occurred to him?

"A Yes, he did.

"Q What was that history?

"A The patient stated that several days before his visit to our office he had sustained a spinal injury while working on a block and tackle in New York. This was acquired, in fact, from the evaluation of the emergency room at Long Island Hospital because he had great pain and disability at that time, and in fact he was brought to that hospital by ambulance. The history at that hospital I am unfamiliar with except that he stated he was treated and X-rayed and then discharged.

"MR. McLAUGHLIN: For the purpose of the record, may we inquire at this point, Mr. Corcoran, Doctor, are you referring, when you refer to your records, to a report that you made, dated March 1, 1971?

"THE WITNESS: No, sir. Right now I am reading from my own records. The record that I made here is here if you wish to see it.

"MR. McLAUGHLIN: I just wanted to inquire, that's all.

"BY MR. CORCORAN:

"Q Included in that history that Mr. McSweeney gave you, did he tell you that he was pulling or guiding a block and tackle on his employer's ship and that he felt a twisting and severe pain in the lower back?

"A Yes. That was the mechanism of injury.

"Q Did he describe this twisting as knifelike in nature?

"A Yes, sir.

"Q Did Mr. McSweeney as part of the history given to you tell you that upon the twisting of his lower back which had occurred --"

MR. BROWNE: Objection at this time, your Honor. The twisting is coming in here in two ways. I object to the leading questions at the time of the deposition.

THE COURT: All right, well, let's go on.

The answer is a responsive answer. Go ahead.

MR. CORCORAN: "A The patient stated that he felt a twisting sensation and severe pain in his lower back with a knifelike pain which made him in fact fall to the ground and he was unable to get up.

"Q I think you told us following this occurrence he was removed to the Long Island College Hospital.

"A Yes, he was taken to a hospital in Long Island.

"Q As part of the history given to you by Mr. McSweene did he thereafter tell you that upon his discharge from the Long Island College Hospital that he was seen by Dr. John Gudelisdo?

"A Yes, he did."

THE COURT: Now, I take it you have an objection to that next question.

MR. BROWNE: Yes, your Honor.

THE COURT: All right, the objection is sustained.

MR. CORCORAN: "Q Doctor, did Mr. McSweeney tell you as part of the history that he gave you what Dr. Gudelisdo saw and what he did for him when he visited Mr. McSweeney at his home?

"A Yes. The patient was visited at home by Dr. Gudelisdo who put the patient on Robaxon, which is comparable to Empirin Compound Number 3 which is a moderate level pain reliever."

Page 10, line 10.

"Q Now, on the first visit to your office on November 17, 1970, did you examine him?

"A Yes, we did.

"Q What did you find, Doctor?

"A The physical examination revealed considerable limitation of lower back movement with muscle spasm in the lower back region as well. Also there was an area of tenderness in the same general location. The neurological examination at that time, including what we do routinely, deep tendon reflexes, motor power sensation, the leg test and the Babinski test were essentially normal.

"Q Did you make any further findings, Doctor?

"A X-rays were taken at that time. These were reported as normal.

"Q Will you tell us, please, what your final diagnosis was with respect to the visit on November 17, 1970.

"A The impression at that time was that the patient had a lumbosacral sprain, that he perhaps had an early discogenic syndrome involving the left side.

"In other words, a nerve root compression without any neurological damage associated with this.

"Q Did you give him any medication at that time?

"A I paced the patient's routine of medication. I put him on what I regarded as a somewhat favorable and more effective anti-inflammatory muscle relaxant and medication which was much more potent, more narcotic, which is called Dilatid.

"Q Tell us, Doctor, what is Parafonforti?

"A Parafonforti is a combination of muscle relaxants and inflammatory medication.

"Q Did you place him on that drug also?

"A Yes, sir. That was the anti-inflammatory medication I mentioned a moment ago.

"Q Upon his examination did Mr. McSweeney evidence any pain?

"A The patient was in considerable pain.

"Q You mentioned the lumbosacral spine. Could you tell us what that means to you as an orthopedic surgeon?

"A This means that the patient had a tearing of ligamentous soft tissue around the joints and support of his lower back to the point where they had been actually torn. Edges were severed.

"Q That is a counterdistinction to a strain which means the parts which were stressed beyond their usual level.

"A That is an actual tearing effect of the support of the spine.

"Q You mentioned that this was perhaps of discogenic origin. Would you explain that to us, Doctor?

"A The reason why we had this initial impression is that the patient had this vague pain in the outer aspect of his left thigh. Even though he had a normal neurological examination. This is not an unusual occurrence whatsoever because many people will have a protrusion of the disc which symptoms are in the lower extremity, but not of objective or even for that matter subjective findings such as a pinwheel various in the lower extremities.

"Q You mentioned a protrusion. A protrusion of what, Doctor?

"A Of the intervertebral disc which is the soft resonant material between the vertebral bodies which helps in the absorption of shock and changes of position of the spine, and which has a surrounding fibrous structure called analous fibrosis which occasionally will become inflamed and swollen because of the adjacency of the nerve roots which exit close by. These nerve roots may become secondarily inflamed causing the so-called sciatic-like syndrome.

"Q Doctor, this disc which you say is a protrusion, is that pressing on the nerve roots?"

There is an objection there, your Honor.

MR. BROWNE: I renew the objection, your Honor.

MR. CORCORAN: All right, page 14.

"Q I am referring, Doctor, of course, to your prior explanation. Would you answer that question, please?"

MR. BROWNE: I have an objection. I'm not sure what that question gets you into. I think the original question was leading, your Honor. This is nothing but a repeat of it, I think.

MR. CORCORAN: The question, your Honor, is at page 13, line 15.

THE COURT: It is his prior explanation.

MR. CORCORAN: And the answer is to that question at page 13, line 15.

MR. HOCKETT: I suggest that the basis of the objection begins on page 17 through page 23.

MR. CORCORAN: Well, he answers at page 15. It's the objection in between.

MR. BROWNE: Your Honor, the main objection at this point is that the question on line 15 is ambiguous. It never says whether they are talking about this case or that case, then we get into the question of whether he made such a finding. These questions are just general questions, I think.

THE COURT: I'm not sure now which one is being objected to. At this point the objection goes to the one on line 5 on page 14; is that right?

MR. CORCORAN: No, your Honor. The question is on line 13, page 15.

THE COURT: Well, that's the one that you --

MR. CORCORAN: And then it's repeated again at page 14, line 5.

THE COURT: Which question are you reading, Mr. Corcoran, to which there is an objection?

MR. CORCORAN: Chronologically, Judge, I'm reading at page 13, line 15.

MR. BROWNE: Which I object to, your Honor.

MR. CORCORAN: Then there is an objection at page 14, at line 5. My question is: "I am referring, Doctor, of course, to your prior explanation."

THE COURT: What is the prior explanation you are referring to?

MR. CORCORAN: It would be on page 13 commencing with line 6.

THE COURT: I take it, Mr. Browne, your basic objection is that the answer which really starts on page 12 at line 18 is that this is an initial impression, and then he goes into a discussion of patients generally; is that correct?

MR. BROWNE: Yes, I think so, Judge. The question, I don't see the question on page 14, line 5 -- line 9. You can't tell what question he's talking about.

MR. CORCORAN: The question he is referring to, or rather I am referring to, is the prior explanation on page 13, commencing with line 6. It's almost a half page of explanation.

MR. BROWNE: Then it's just general, I think, your

Honor.

THE COURT: Well, is there any succeeding testimony that says that that's what this Doctor claims to have found with regard to this particular man?

MR. HOCKETT: Your Honor, I suggest you look on page 15, line 9. I believe that refers back to the discussion on the previous few pages.

THE COURT: All right, we'll take a recess and I'll read this during the recess.

(Recess.)

(Open court; jury not present.)

THE COURT: Now, you had a question which you were asking on page 14, and as I read this record, Mr. Corcoran, this deposition of Dr. Cook, starting at page 12, even starting at page 11, he says it was his impression at the time that the patient had a lumbosacral sprain. You then ask him at page 12, "You mentioned the lumbosacral sprain" -- it should say sprain instead of spine, and you ask him what that means and then he says, in effect, what that means in the general rather than in the specific.

The answer is at the bottom of 12 and up to 13, and then you ask him to comment further on that, and then Mr. McLaughlin asks him at page 15 if what he has been talking about was the situation in this law suit, and the Doctor said, "I have no way of knowing, I am only conjecturing."

Now, it seems to me that that makes that whole area inadmissible. Now, is there any reason that it is admissible?

MR. CORCORAN: If your Honor please --

THE COURT: You may sit down, sir. There is no need to stand.

MR. CORCORAN: The deposition in its completeness confirms the opinion that he gave and which he described as conjectural.

Initially, a doctor, upon examination, customarily makes a finding --

THE COURT: Fine, but I assume somewhere later in the deposition you asked him, "What did you find and were the events on the barge a competent producing cause of what you found?"

MR. CORCORAN: Yes.

THE COURT: Do you ask him that later?

MR. CORCORAN: Yes, sir.

THE COURT: Then let's go on to that. All right.

MR. CORCORAN: Well, you see, excepting this, Judge, in the course of the various visits the first diagnosis may not be the final diagnosis.

THE COURT: I know it, but I think it improper for this jury to be listening to speculation that turns out to be not so. Doctors are permitted to speculate because they have got to do it to see what to do for their patients, but that is for a different purpose. We are here to determine, assuming you get to damages, what the injury in fact was, and if it is attributable to any defendant, what recompense should be paid for it. And we don't really need to know what the Doctor speculated about all along the way.

MR. CORCORAN: Yes, your Honor. I disagree. That's the customary diagnostic method of a surgeon to make a first impression.

THE COURT: I agree, but that has nothing to do with the jury's question. That is the Doctor's problem. We now have the jury's problem.

MR. CORCORAN: Then he takes further tests and further tests and further examinations, then he finally comes up with the final diagnosis.

THE COURT: All right, let's get to that. I'm going to sustain an objection to the question on page 14.

Would you bring the jury in.

(Jurors enter the courtroom.)

THE COURT: Go ahead, sir.

MR. CORCORAN: Page 14, line 11.

"Q Would a twisting of the lower back produce this condition that you have just described?"

THE COURT: The objection is sustained.

The answer is conjectural, Mr. Corcoran.

MR. CORCORAN: I submit, your Honor, that --

THE COURT: All right, I --

MR. CORCORAN: Conjectural is the same as an opinion.

THE COURT: No, I have ruled.

MR. CORCORAN: All right.

"Q Would such an injury as a twisting of the lower back cause the disc of this --"

THE COURT: The objection is sustained.

The answer again says "could."

Is there somewhere along here where you ask him what his final diagnosis was and was it competently produced by the events as you described them to him?

MR. CORCORAN: Well, on page 16.

THE COURT: All right.

MR. CORCORAN: "Q Doctor, can you state with reasonable certainty as a physician and surgeon that the twisting of the lower back caused the injury which you describe as a protrusion pressing on the nerve?

"A The injury is compatible with this type of end point result."

MR. BROWNE: Your Honor, I move to strike that as not responsive.

THE COURT: I am going to reserve decision on that at this point. I will consider that at a later point.

MR. CORCORAN: "Q So that the Court and jury may particularly understand, when we speak of a disc would you tell us what that is, Doctor?

"A The anatomical description of a disc consists of essentially two major components. One is the firm fibrous structure which surrounds the softer enclosure which is the second component. The first described component extends between the vertebral bodies surrounding the entire essentially circular cookie-shaped structure and extending between two adjacent vertebral bodies.

"The softer center material supposedly has more elasticity to it and is more liquid in nature.

"In essense it is really a solid structure which is named as different kind of cartilaginous material.

"Q Would you say that a disc would act, say, like a cushion between the vertebrae of the bone?

"A Yes, that is true.

"Q Is this semi-liquid condition that you described, does that give the spine mobility?

"A It assists to some extent in giving mobility. Also it gives resiliency to vertical thrusts through the spine.

"Q In everyday language would it be fair to say that the disc is in the nature of a self-contained cushion between the vertebrae?

"A That sounds like a good description.

"Q Now, this injury occurs following a twisting of the lower back; does that cause a narrowing of the disc space?

"A Not necessarily. Essentially in a young man like this the disc space in all likelihood will retain the normal height for a considerable period of time.

"Q Well, then, when the disc protrudes out of the contained space into the area of the column where the nerve roots are located, what does that cause to the patient?

"A Well, by pressing on the nerve root it can cause severe type pain in the lower extremity, and sometimes into the groin, and sometimes into the general area. Occasionally it confines itself to the lower back. As strange as it may seem, sometimes there isn't any sciatic type pain. Sometimes there is no pain in the lower extremity, and only pain in the lower back. Even though it is herniated.

"Q Did you find --"

THE COURT: You withdrew that question.

MR. CORCORAN: Yes, you are right, your Honor.

"Q Did Mr. McSweeney, upon examination, complain of any pain to you?

"A He complained of pain, yes.

"Q In what area?

"A In his lower back.

"Q Would this injury that you described to the disc with the protrusion upon the nerve root, would that be a competent producing cause of pain?

"A It would.

"Q Now, you mentioned, Doctor, the sciatic nerve. Tell us what that is.

"A The sciatic nerve is a major nerve in the lower extremity involving the back of the thigh. The musculature and sensation as well as in the entire lower extremity from the knee down involving its sensation and motor power, muscle power.

"Q What is the sciatic notch?

"A The sciatic notch is the anatomical location through which the sciatic nerve exits. from its original site within the pelvis to more external sites into the buttock region.

"Q Did you, Doctor, upon your examination of Mr. McSweeney find that this pain was radiating in character?

"A I did not find any true radiating pain.

"Q Doctor, I refer to the report of December 1st where it says --

"A We haven't done this in an orderly fashion. I am still looking at November 17th.

"Q When you say the type of radiating pain and findings locally such as sciatic notch tenderness leads me to this feeling --

"A This is December 5 you said.

"Q Yes. Would that refresh your recollection, Doctor, as to whether or not this pain was radiating in character?

"A Yes, it would. I'm sorry to confuse anyone, because I was still referring to the intitial November 17th evaluation, and I did not have, I didn't realize that you had gone on to the next period of time. What visit are you talking about?

"Q On November 17th, 1970, and it is with respect to that particular visit that you said you did not find any radiating pain at that time.

"A Yes, sir.

"Q Now, you have used the word herniation. Will you tell us, please, what what means?

"A That means that there is a protrusion of the disc, or enlargement of the disc which causes pressure on the nerve root.

"Q Did you as a result of your examinations not only on the first visit but on the subsequent visits come to a conclusion as to whether or not Mr. McSweeney had been suffering from a herniation of the disc?

"A It is my conclusion that he possibly had a herniation of the nucleus pulposus."

MR. BROWNE: I object to this, your Honor.

MR. CORCORAN: The witness -- he said that was a suspicion, and the witness, Dr. Cook, answers, "I felt that there was good probability that he did not, really, I think it was more than that."

"Q Can you say with reasonable certainty as a physician and surgeon that he did have a herniation of the disc based upon all the findings and examinations that you conducted?

"A I felt that he had a herniation of the disc without any neurological changes.

"Q Is it possible, Doctor, to have a herniation of a disc without neurological changes?

"A Yes, it is.

"Q So that it is not inconsistent with the fact that neurological findings were otherwise normal.

"A No, it is not inconsistent at all.

"Q Now tell us when was the next time that you saw or examined Mr. McSweeney.

"A The next visit was on November 24th at which time he showed some degree of improvement and then had a normal neurological examination. We had discontinued medication at that time, but asked him to stay out of work.

"He had a third visit on December 2, 1970, and he seemed to be improving further. And although he still had low back discomfort, patient stated that he tried to use a broom to sweep the front walk and that it caused low back pain and he found inability to ride in a car even a short distance to come to our office.

"The neurological examination again was normal and he stated that he had some limitation of the back. We noted that he had some limitation of back movement at that time and he was put on an exercise program and asked that a lumbosacral support for his back. In other words, a garment, or belt, if you will.

"Q Does that particular garment or belt have any particular name?

"A Most people have these lumbosacral supports. There are various manufacturers that we try to use. The Camp device which is usually distributed to most of the surgical supply houses in the area.

"Q Is the Camp device a type of support that has no belt?

"A The Camp is a manufacturing company which makes various orthopedic devices for support. Among them are several types of support for the back.

"Q You mentioned that you put him on exercises. What type of exercises?

"A The Williams exercise routine is a commonly employed physical means of improving abdominal muscles. Strengthening in which in turn is very important for back support.

"Q Were these exercises undertaken by Mr. McSweeney?

"A Yes, sir.

"Q What would be the purpose of these exercises?

"A Their intention is to improve abdomen muscle strength and size that might give better back support.

"Q Now, on this visit on 12/2/70 did Mr. McSweeney make any complaints referable to his neck?

"A Yes, he did.

"MR. McLAUGHLIN: Was that the first time he did so?

"THE WITNESS: Yes, sir.

"Q What was the nature of the complaints Mr. McSweeney made referable to his neck?

"A That he had discomfort there and limitation of motion.

"Q Did you have an opinion, Doctor, referable to this complaint of discomfort and pain in the neck as being associated or connected with the injury that he had described to you?

"A The development of neck complaints is compatible with the same type of mechanism of injury which caused his low back problem.

"Q Please tell us on this occasion when he made complaints referable to his neck did you examine him as to any limitation of motion of the neck at that time?

"A The patient had limitation of motion by physical examination on that occasion.

"Q When was the next time, Doctor, that you saw Mr. McSweeney?

"A The patient was seen on the fourth occasion, which was 12/15/70. He did not feel any further improvement had taken place, and in fact stated he felt worse.

"Q Did he make complaints of any particular portions of his body?

"A He complained about his back. And also complained about pain in his extremities. Especially the outer side of his thighs. Despite the fact that he had a normal neurological evaluation once again.

"Q Now, the complaints of pain in the outer side of his thighs, did this lead you to believe that he was experiencing this radiation or radiating pain and this was compatible with the radiating type of pain from the lower back?

"A Yes.

"Q Is a radiating pain some evidence to you with reasonable certainty as a physician and surgeon that it is of discogenic origin?"

There was an objection by Mr. Browne.

"Q My next question is: I will put it this way, Doctor, would you explain to us what radiating pain meant to you as a physician and surgeon insofar as a discogenic origin of his injury?

"A I still felt that this was compatible with the involvement of the disc or the surrounding ligaments of the annulus fibrosus which was causing peripheral lower extremity pain in this case.

"Q This visit on 12/17/70, did you find any tenderness in the lumbosacral region?

"A Yes.

"Q What treatment did you recommend or start him on at that time?

"A We started him on a course of physical therapy.

"Q Tell us, please, what the physical therapy course consisted of?

"A I believe this was done, I don't have it specifically written here, I usually first start with diathermy treatment.

"Q Tell us what diathermy means.

"A Diathermy is a means of projecting heat by very short waves into the hyperstructure which cannot be reached by superficial applications of heat.

"Q What do you call that mechanism, or instrument by which this deep heat is penetrated into the area which it is being applied to?

"A This is diathermy.

"Q Yes, is there any particular type of mechanism by which diathermy is applied?

"A It is movement by an instrument, by a machine.

"Q What is the nature of that machine that gives off this deep heat?

"A It's deep heat, it's a short wave emanation from an energy source which can penetrate soft tissues in counter-distinction to the long waves which we get from other sources which are six feet in length which just bounce off. Essentially they are short microwaves. They penetrate down into the deeper tissues.

"Q The tissues that you told us about were the first course of this diathermy that you recommended; was there any further course of physical therapy besides the diathermy?

"A On the subsequent visits, January 7, 1971, we continued the physical therapy.

"Q Did you examine him on that occasion?

"A Yes, sir.

"Q Tell us, Doctor, what did you find referable to his neck and back syndrome?

"A I summarized it in the first sentence. I stated that he had some transient, and then this neck and back pain reoccurred in the rather full blown manner and he was unable to perform his normal activities.

"Q Now, when you say that it had come into a full blown manner, what do you mean by that, Doctor?

"A That he had a reoccurrence of all of his pain as he had essentially before we even began treatment.

"Q Would you say that that reflected no improvement so far as his condition and complaints of pain were concerned?

"A Yes, sir, I would say that.

"Q Were the neurological findings normal at this time?

"A Yes, sir.

"Q Is the absence of neurological findings compatible with the injury and complaints that he made to you on January 7, 1971?

"A Yes, they are.

"Q Did you put him on any medication at that time?

"A We had the patient on a very small dose of Valium which is the tranquillizer and muscle relaxant type of medication and also asked him to get the lumbosacral support mentioned previously.

"Q Did you have any opinion at that time, Doctor, as to Mr. McSweeney's returning to work?

"A I didn't think the patient was capable of returning to work at all at that time.

"Q When was his next visit to you, Doctor?

"A January 21, 1971.

"Q Tell us, please, did you examine him on that occasion?

"A Yes, we did.

"Q What were your findings at that time?

"A We found again that he had not improved at all. The patient stated in fact that he felt worse. We suggested hospitalization and evaluation while in the hospital as needed.

"Q Did you at that time consider that Mr. McSweeney still had a discogenic problem to his back?

"A Yes, sir. I thought it was of discogenic origin.

"Q Was Mr. McSweeney admitted to a hospital?

"A Yes, he was admitted to the Overlook Hospital on January 23, 1971, and he remained there through February 2, 1971.

"Q Where is the Overlook Hospital, Doctor?

"A In Summit, New Jersey.

"Q Are you attached to that hospital?

"A Yes, sir.

"Q Tell us, please, when he was in the hospital did you visit him there?

"A Yes, sir, daily.

"Q Had you made any recommendations referable to the type of treatment he was to receive?

"A The patient was put in traction, physical therapy and medication. He also had a neurological examination by Dr. Henry List.

"Q Doctor, when you say he was placed in traction, what does that mean?

"A Traction is a classical type of treatment for attempting to relieve pressure on nerve roots and to immobilize to some extent the lower spine.

"Q Tell us just briefly what is the means by which the traction mechanism worked. Just what is done to the patient.

"A The lower back traction, the patient is placed in a comfortable position, either flat on his back or with his back bent up and his knees bent in a semi-fetal position. There are two ways of applying traction. One is to put traction on both legs and pulling it over the end of the bed.

But that is more sufficient. We use a pelvic -- but what is more sufficient, we use a pelvic type of traction where the bands are applied around the hip region and then the spreader bar connects to that from a pulley. The system takes it out over the end of the bed.

"Q Would you say in ordinary common-day language, is that traction a pulling effect on the portions of the body so as to relieve the pressure on the nerve roots?

"A Yes, sir.

"Q How long a period of time, Doctor, was Mr. McSweeney in traction at the Overlook Hospital?

"A He was in traction the entire period.

"Q Did he have to remain in this position during the time that he was in traction?

"A No, I only allow traction to be put on intermittently. I don't like to use continuous traction. I think it is too disturbing to the patient.

"Q At what stages is that traction applied intermittently?

"A I usually don't like to use it at night. I use it during the day for an hour or two, and then give the patient a rest for an hour or two, alternating as such. It's an on and off type of treatment.

"Q Now, is the strain supplied to the lower area as much as the neck is held firm?

"A I don't quite understand.

"Q What I'm trying to have you explain a little more in detail is the traction operation business. Is the lower extremity or the pelvic area held in traction or held by a force while the upper portion of his body is held firm to enable the pulling effect to take place?

"A Yes. In essence we can tilt the bed in a manner that we can let his body weight act as the countertraction.

"Q Where is the first pulling force applied? Is it in a downward area?

"A In a distalward manner. In other words, towards the foot of the bed.

"Q Then is the upper portion of his body held firm or is there a portion pulling upward while there is a similar force pulling downward toward the foot of the bed?

"A As I say, we usually allow the patient's weight to be his countertraction.

"Q Did you find that this traction improved or relieved his pain somewhat?

"A Whether we can attribute that to traction or the rest and medication and physical therapy, I don't know. He did improve while under traction treatment.

"Q While the patient, such as Mr. McSweeney, was in traction, is that very act of traction compatible in producing the cause of pain itself?

"A The traction can be a disturbing thing to be involve with as a patient, yes.

"Q Tell us, please, when you next saw Mr. McSweeney.

"A Following the patient's discharge from the hospital he was seen on 2/9/71, which was approximately a week after discharge. The patient felt at that time that he was gradually improving, but still had discomfort in his lower back and radiation, and in fact to both lower extremities, and I still felt at that time that we were dealing with a nerve root compression syndrome which was of disc origin in the lumbosacral spine, despite the fact again his neurological examination was normal.

"Q Again, Doctor, are your findings with respect to the discogenic (inaudible) findings?

"A Yes, it is compatible.

"Q At this time will you confirm in your opinion by the fact that radiating pain and the findings (inaudible) tenderness led you to this feeling?

"A Yes.

"Q Did you have an opinion as to whether or not Mr. McSweeney should return to work at that time?

"A No, I didn't feel that he was ready to return to work.

"Q Did you have any opinion in your mind about continue
need for Mr. McSweeney to have rest?

"A I felt that he should continue on rest or diffused activity.

"Q Did he at that time continue to complain of pain in the neck?

"A Yes, he did complain of pain in the nect on that visit.

"Q Did you have an opinion as to whether that pain in the neck was related to his injury; is that the reason he described?

"A I felt it was related to his injury.

"Q Did you examine his neck? Did he have any spasm or restriction of movement?

"A Yes, he did have some alleged spasm at that time, but this neurologically with regard to the upper part of his neck, his upper extremity to his neck, was normal.

"Q At that time did you have any recommendations as to the type of continued treatment that he should have?

"A Well, we were diminishing the use of diathermy to his lower back and we had recommended that intermittent heavy traction to his neck, heavy cervical traction.

"Q Did you see him at any time after that, Doctor?

"A The patient was seen again on August 3, 1971. That was his last visit.

"Q What did you do for him on that occasion?

"A The patient was continuing to have a good deal of complaints which seemed to be rather legitimate. He was back to work, but he did no overtime activity at all even though it had been offered to him, he stated.

"He was only able to work approximately four hours a day at his usual situation as a crane operator and was forced to use a back support, and without the back support he stated he was very disabled.

"He stated that after four hours of work he had enough pain in his lower back to really disable him, and then tended to drift off into the left lower extremity and thigh and he stated even further down (indicating) forward of his knew and below.

"The patient stated he was unable to do many of the things which he usually is required to do at home because of his low back, his lower back and left lower extremity pain, and particularly when he first arose in the morning he was stiff and uncomfortable and it took him awhile to get himself mobile.

"His physical exam at that time indicated that he had some lumbosacral tenderness, and also tenderness in the left posterior/superior iliac spine, and this is in an area that very commonly is tender in patients who have true lumbosacral problems. They can never understand why they have pain off to one side or the other. This is where they have their pain referred.

"The straight-leg raising test was normal and the deep tendon reflexes were equal. Motor power was normal, and there was some question at this time of the S-1 nerve root on the left side being diminished to sensation.

"This is the area of the outer side of the foot and heel area. This is the pinprick test. By placing a pin upon the patient and asking him on all areas of his body which we think, we know contributes to certain patches of pain sensation. He was put back on an exercise program and we suggested that he use the support, and that was about the only treatment we followed for him at that time. This was his last visit.

"Q Now, Doctor, I am going to put to you a question and ask you an opinion, and I would like you to assume, Doctor, that the plaintiff, Michael McSweeney, on November 14, 1970, at about 8:10 in the morning, while standing on the pier adjacent to the floating crane known as the R-5, and that the crane on this vessel was lowering a four-part block from the boom of the crane, and that this block weighed in the neighborhood of 1000 pounds; that as the block was being lowered, Mr. McSweeney reached out to guide the block to the pier and put his hands on the block when suddenly he felt a twisting and severe pain in the lower back which was knifelike in nature; that the twisting of the lower back caused Mr. McSweeney to fall to the ground and that he was unable to get up and that he was later assisted and taken to the Long Island College Hospital and that thereafter he moved to his home where he was seen by Dr. Gudelisdo.

"Then on November 17, 1970, he was referred by Dr. Gudelisdo to you and that he was under your care and treatment and that he was thereafter admitted to the Overlook Hospital and placed in traction and that subsequently he was discharged to his home.

"Can you say, Doctor, with reasonable medical certainty that the occurrence of the twisting of the lower back on November 14, 1970, was the competent producing cause of the injuries which you found upon examination?

"A Yes, I can.

"Q Were they the competent producing causes?

"A I believe they were.

"Q Tell us, Doctor --"

MR. BROWNE: May I object now, your Honor, and rely on the cases of Evans against Snyder Transportation Co., 250 F 2d, 710, Ortiz v Grace Lines, Inc., 250 F 2d, 124, both in the Second Circuit, both decided in 1957, your Honor?

I think I raised this point previously.

THE COURT: This is what, to the next question?

MR. BROWNE: Yes, your Honor, as to the amounts of the bills and so forth.

THE COURT: I see.

MR. BROWNE: As far as I know, everything was taken care of. I believe that is true.

MR. CORCORAN: With all due respect, your Honor, to Mr. Browne, there is no proof --

THE COURT: Well, then, let's hold on here; let's not get into it at this moment.

MR. CORCORAN: We are talking now about the bills.

THE COURT: Yes, I understand. Do you have those authorities here?

MR. BROWNE: I don't have them with me, your Honor.

THE COURT: Well, how much more have you got to read, Mr. Corcoran? Can we go on to another subject and I will reserve decision until I can look at those cases.

MR. CORCORAN: I just want to read the amounts of the bills.

THE COURT: No. I mean, what else have you got in this examination to read besides that? I would like to look at the authorities called to my attention so that I can give proper thought to this.

MR. CORCORAN: Well, on page 41, your Honor:

"Q You stated that you visited Mr. McSweeney daily while he was a patient at at Overlook Hospital."

THE COURT: All right, I will reserve decision on that area until I have had the chance to look at those authorities.

MR. CORCORAN: Shall I continue on this?

THE COURT: So go forward.

MR. CORCORAN: "Q Doctor, you stated that you visited Mr. McSweeney daily while he was a patient at Overlook Hospital.

"A Yes, sir.

"Q In the course of those visits following the examinations did you make entries or notations in the hospital chart?

"A Yes, I usually make them every other day or every third day.

"Q Is that hospital chart of Overlook Hospital kept in the regular course of business of the hospital?

"A Yes, sir."

I then served Dr. Cook with a subpoena with the appropriate witness fee and served him with a copy of the --

THE COURT: Well, there has been no objection to the use of the deposition.

MR. CORCORAN: Well, at the time of the examination, Judge, we offered for identification on this examination the bills of the Westfield Orthopedic Group.

MR. BROWNE: Your Honor set that --

THE COURT: I'm going to look at these questions in a recess. Now, have you got any more of this examination you want to --

MR. CORCORAN: That's all, your Honor.

THE COURT: Do you want to read any portions of it?

MR. BROWNE: I do, your Honor.

On page 42, line 10.

"Q Going to the mechanism of injury --"

THE COURT: Mr. Browne, the record should show these questions are by you, I think.

MR. BROWNE: Yes, your Honor, they are.

"Q Going to the mechanism of injury, is it my understanding that the mechanism of injury was the twisting of the body as you understood it?

"A Yes, sir. He said he had his hands up over his head and this heavy device, whatever it was, on the crane had shifted and apparently he was trying to guide this. I felt that this caused a torsional force in his back which caused his problem.

"Q So the mechanism was the twisting of the spine?

"A Yes.

"Q This would not be so much of a downward force as a twisting force; is that right?

"A Yes, sir.

"Q Could you have a similar mechanism, Doctor, if, say, you bent over quickly to pick something up in a strained way or something?

"A Yes, I think it would be a variation, and therefore of a similar type.

"Q Now, say someone was bending down on a job working, fixing something, not particularly heavy, could you have a similar mechanism of injury?

"A Yes, sir, you could.

"Q In other words, could you have this injury just by moving in a strange way even if you aren't bending?"

There was an objection to that.

"I withdraw the question. I'm sorry.

"Q Could you have an injury like this just because of a quick turn that you might make with your body, that the plaintiff might make with his body?

"A Yes, he could."

MR. CORCORAN: Objection there, your Honor.

THE COURT: Yes; that is overruled.

MR. BROWNE: We are now at page 48, line 13.

"Q When did Dr. List examine him?

"A Dr. List examined Mr. McSweeney during his hospitalization. Sometime between January 25, 1971 and February 2, 1971.

"Q What is Dr. List's qualifications as a medical doctor?

"A Dr. List is a neurosurgeon and a member of the Academy of Neurosurgeons, as well as represented by the Neurological Committee throughout the world.

"Q Where would you say that Dr. List ranks in terms of neurosurgeons who practice in the New York Metropolitan area?"

There was an objection, then the question was:

"Q Are you familiar with neurosurgeons in the general New York Metropolitan area?

"A Yes, sir.

"Q How would you say Dr. List ranks among the neurosurgeons in the New York Metropolitan area?

"A He ranks as a highly competent neurosurgeon.

"Q Would you say that he is one of the best?

"A That is my personal opinion, that he is.

"Q Is that based not only on your opinion but on the opinion of the members of the medical community to which you are familiar?

"A Yes, sir.

"Q You asked Dr. List to examine him, did you not?

"A You did that for the purpose of learning more about what the condition was, didn't you?

"Q I take it the reason you asked the neurosurgeon to examine the patient was to see if there was something wrong with his nerves; isn't that right, Doctor?

"A Yes, to see if there was a problem which would require a further evaluation of procedures at that time.

"Q Do you have a copy of Dr. List's report?

"A don't have it. I have just been mentioning that he had examined the patient.

"Q May I see your records on that, sir?

"A Yes, sir.

"Q Doctor, I'm going to show you a document, a three-page document, a Xerox of an original furnished to us by plaintiff's counsel, and I will ask that it be marked first by the reporter as Defendant Rudolph Exhibit A for identification."

I will produce that at this time, your Honor, which is marked at present as said Defendant's Exhibit A for identification on 3/17/76.

MR. CORCORAN: I object, your Honor, to it even being marked for the reason there is no foundation --

THE COURT: You can't object to it being marked for identification.

(Defendants' Exhibit B marked for identification.)

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: On what theory does this become admissible?

MR. BROWNE: This man also --

THE COURT: Because when a doctor sees him and sends his report to another doctor --

MR. BROWNE: It will come out in the deposition that Dr. Cook relied on Dr. List's report. Also some of it is in the hospital record, but one page is missing from the hospital record that was furnished to us. Much of this is precisely according to Dr. Cook what was written in the hospital record, but the hospital record we were furnished is missing a page. This is not just an expert's report. This is the treating eminent consultant who finds no disc problem. And this was relied on by this testifying witness.

This was one of the things that he had to enable him to reach a decision, was Dr. List's opinion.

THE COURT: Well, where do you get to that as a foundation? Because otherwise it seems to me this is wholly inadmissible. Dr. Cook says he made his findings in part based upon Dr. List's report, and that becomes a part of Dr. Cook's findings, but if he doesn't make such a statement it seems to me --

MR. BROWNE: We will get to it.

MR. CORCORAN: Your Honor, I think that's wholly wrong as a rule of evidence. I can't examine that piece of paper.

MR. BROWNE: I think I have laid a background, your Honor. Try page 51, line 11 -- 12, I mean. Start at 9. On line 22 on page 52. This goes on and keeps building up. Page 54, line 8.

MR. CORCORAN: This will be a new rule of evidence.

MR. BROWNE: Will you shut up a minute?

THE COURT: Now, just keep your voices down. You have just given the jury a nice little laugh with that exchange.

MR. BROWNE: Here, at 55 you will see that the page is missing. These are the records Mr. Corcoran furnished us.

MR. CORCORAN: The entire hospital record is in court, your Honor.

THE COURT: But I don't see that this gets this doctor's written opinion into the record. If it's in the hospital record, it goes in in the hospital record exception, but this is the man's report; this Doctor doesn't say he relied on it, but he says, "I agree with this" or "I don't agree with that."

I'll tell you, at this point 1 am going to esclude it. The objection is sustained.

(Open court.)

MR. BROWNE: I refer to page 55 at which copies of portions of the Overlook Hospital records were marked during my examination, and I ask if that record itself is in court today?

MR. CORCORAN: To the best of my knowledge, Mr. Browne, the hospital chart of Overlook Hospital was subpoenaed by me, and I believe it is in court. It is marked as Plaintiff's Exhibit 5 (handing).

MR. BROWNE: Thank you.

On page 57, line 5, referring to the Overlook Hospital record.

"Q Doctor, let us turn to that note of January 25, 1971. Do you know whose handwriting this is?

"A It appears to be Dr. List's.

"Q Are you familiar with Dr. List's handwriting?

"A Yes, for the most part.

"Q Is that the same handwriting that you find on the whole next page?

"A Yes, it is."

I will skip the next question and go to line 18, your Honor.

"Q Now, Doctor, would you read down on this, and I'm going to count down on the second page, and we have Dr. List's writing, and I will continue up to 10 lines from the bottom, and would you read to me what you find 10 lines from the bottom in Dr. List's notes?

"A It states, 'Neurologically 6'3", 215 pounds, gained 10 pounds since injury. Cooperative, alert, intelligent, oriented. He moves remarkably (something), claiming enough pain to be in the hospital. ROM,' meaning range of motion of neck, 'is brisk and full. Upper posterior cervical muscles: muscle action noted with rotation of head toward the right shoulder. Excellent cervical lordosis. No tenderness or PBM' meaning -- it says here, I think it's spelled wrong, paravertical muscular spasm, lumbosacral, only tenderness is found over the sacroiliac joint. Flexion is easily done until the fingertips reach the floor.'"

I will skip the next question, your Honor.

MR. CORCORAN: Excuse me; the next question is, "Do you have the next page?" and the Doctor answers, "No." So therefore the next question can't be answered.

MR. BROWNE: It's here now, your Honor. The whole thing is here.

MR. CORCORAN: But this question refers to what Dr. Cook had at that time. He didn't have this report.

MR. BROWNE: That's right. That was the report that we got from plaintiff's counsel, your Honor, in the mail, and there was a page missing.

MR. CORCORAN: And which was the copy that the hospital sent to me, but he cannot comment now with regard to a record that's in evidence now which Dr. Cook did not have.

MR. BROWNE: He saw a part of it.

MR. CORCORAN: I submit, your Honor, if he only saw a part of it he can't comment.

THE COURT: He has got a comment on the part that he saw; isn't that appropriate?

MR. BROWNE: Yes.

MR. CORCORAN: No. He says at page 58, your Honor, line 15: "Q You don't have the next page, Doctor; is that right?"

"A No."

That's what --

THE COURT: But we have to establish the limits as to what the Doctor is going to comment on. He didn't ask him to comment.

Yes; overruled.

MR. BROWNE: "Q Doctor, is Dr. List's comments that there was, what was it, a free motion or free range of motion for someone claiming this much pain, do you know the comments I am referring to?

"A Yes.

"Q Doctor, is that comment compatible with malingering?

MR. CORCORAN: Objection.

THE COURT: On what ground?

MR. CORCORAN: There is no proof that there is malingering here.

THE COURT: Overruled.

MR. BROWNE: "A I suppose in the broader sense of the term you could say it would be compatible with it.

"Q Doctor, I would like to go to the neck and hands. Your diagnosis was that you talked about a herniation of the lumbar disc; is that right?"

MR. CORCORAN: What page are you on?

MR. BROWNE: Right down below. I haven't skipped anything.

"A Yes, sir.

"Q What is the area of the lumbar disc on one's back? Is that by the neck or down?

"A The small of the back.

"Q The lower part of the back?

"A Yes.

"Q Is it where the belt goes around and up a little bit?

"A Yes, sir.

"Q Do the nerves that one finds in the spinal column at that location have anything to do with the sensation or motions of the hands?

"A No, they do not.

"Q When did you first learn of the problem with the plaintiff's neck?

"A I believe that he reported it to me on the second or third visit to the office.

"Q Did he ever tell you that his fingers were tingling?

"A No, not that I recall.

"Q Did he ever report to you any loss of sensation in the hands?

"A I don't remember him reporting that.

"Q Did he ever report to you any loss of ability to use the hands?

"A I don't recall any report of that nature.

"Q Can any of those conditions be caused by herniation of the lumbar disc?

"A Not of the lumbar disc, no, sir.

"Q Does a herniation of the lumbar disc usually produce pain in the neck?

"A No, sir, it usually does not."

THE COURT: Wait, Mr. Browne.

MR. CORCORAN: With respect to the questions read by Mr. Browne --

THE COURT: Which, "Does a herniation of the lumbar disc usually" --

MR. CORCORAN: No, with respect to the questions read by Mr. Browne --

THE COURT: Which one?

MR. CORCORAN: I'm going to identify them. With respect to questions pertaining to fingers tingling and ability to use hands, that is not part of the direct testimony and hence it is not in the Doctor's report and it is improper cross examination. It is not proper cross of the Doctor.

THE COURT: Doesn't it bear upon the diagnosis of the nature of the injuries?

MR. CORCORAN: There's been no establishment in the direct testimony read of Dr. Cook by the plaintiff, by myself, of these --

THE COURT: I know, but isn't the Doctor entitled about things that bear on his diagnosis, even though you didn't touch upon it?

No, the objection is overruled.

MR. CORCORAN: Except this, your Honor: the way the question is read it says did he report it. It's like a double question. He never reported it.

THE COURT: I understand. The objection is overruled.

MR. BROWNE: "Q Does a herniation of the lumbar disc usually produce pain in the neck?

"A No, sir, it usually does not.

"Q Does it usually produce pain in the cervical area?

"A No, sir.

"Q Were you ever called upon in any way to treat the man's left arm?

"A Only indirectly to the complaint referable to his neck area.

"Q What was your diagnosis of the neck area problem?

"A As I recall, it was a cervical spine sprain.

"Q That had nothing to do, then, with the disc, did it?

"A No, I don't recall that it had anything to do with the disc.

"Q He never told you about pins and needles in his fingers? Did he ever tell you about that?

"A Not that I recall."

I will skip down to line 16 on page 62.

"Q Doctor, I'm going to return the Overlook Hospital record to you. I will return them to you. I want you to open to a page which is numbered 38 and dated 1/27/71. In fact, I won't have to give it to you. I see it is in your records also.

"I will ask you to refer to your own office records, to the X-ray report of Dr. Cavalino, dated 1/27/71.

"Is it true that you requested this X-ray by Dr. Cavalino?

"A Yes.

"Q Is it true that Dr. Cavalino did an X-ray and felt that there was a deformity of the cervical body, the fifth cervical vertebrae body?

"A Yes, sir.

"Q The fifth cervical vertebrae body, would that be connected with the head and shoulders and the neck and the back and so forth?

"A --"

I don't think that's the way the question was asked.

MR. CORCORAN: Read the answer.

MR. BROWNE: The answer: "It would be slightly a little bit lower in the center of the neck.

"Q That was deformed, that body; is that right?

"A It shows a slight deformity, C-5 vertebral body, probably post-traumatic.

"Q Doctor, read it again very carefully. It seems possibly due to an old trauma; is that what it says precisely?

"A The impression is slight deformity of the C-5 vertebral body, possibly post-traumatic.

"Q I will refer you now to the paragraph above that where it says 'possibly due to an old trauma.'

"A The 5th cervical vertebral body is (inaudible) anterior surface probably due to an old trauma."

MR. CORCORAN: Excuse me. Read my objection.

MR. BROWNE: I'm not going to read your objection.

THE COURT: No, that objection is overruled.

MR. CORCORAN: Excuse me, your Honor. I object specifically on the ground that it is speculative. Now, you have held speculative answers to be improper.

THE COURT: The objection is overruled.

MR. BROWNE: "Q Doctor, this report is part of the hospital record as I showed you, isn't it?

"A Yes.

"Q This was done in Overlook Hospital where the patient was hospitalized under your care; wasn't he?

"A That's correct.

"Q This will be part of the hospital records?

"A Yes, sir.

"Q There are other copies, of course?

"A Yes, sir.

"Q That was done about January 27th, 1971,

"A Yes, sir.

"Q Which would be sixty, seventy days after the accident we are talking about. Is it possible that Dr. Cavalino was referring to the accident of November 14th, 1970 when he said old trauma?"

MR. CORCORAN: And my objection there is reported on page 65, comparing one witness with another. The operation of the mind. Dr. Cavalino --

THE COURT: Overruled.

MR. BROWN: "Answer: I don't feel that he was referring to trauma of recent origin.

"Q You do not feel he was referring to trauma in recent months?

"A I don't believe he was referring to trauma in recent months.

"Q Dr., it is part of your job as an orthopedist to interpret X-ray reports of Dr. Cavalino, isn't it?

"A Yes, sir.

"A Yes, sir.

"Q In your treatment of patients, doctor, you have to rely upon your ability to read documents just like this X-ray report, do you not?"

MR. CORCORAN: Mr. Browne would you please read my objection?

MR. BROWNE: No.

MR. CORCORAN: Then I will read it. "I move that the answer be stricken." That's on page 65 at line 16.

THE COURT: That objection is overruled.

MR. BROWNE: "QUESTION: Did you happen to look at the X-ray yourself, doctor?

"A Yes, sir.

"Q Did you make any comment in the record as to the correctness of this X-ray report?

"A I don't recall."

MR. CORCORAN: Your Honour, on the basis of your former rulings that a witness who says, I don't recall, that question should be stricken.

MR. BROWNE: May I go on to --

THE COURT: Yes. Overruled. Go ahead.

MR. BROWNE: Line 15. "QUESTION: Did you ever indicate to Dr. Cavalino that you thought this report was erroneous?

"A No, sir.

"Q Do you concur with his report?

"MR. CORCORAN: Objected to.

"A I feel this is a valid report.

"Q You did look at this particular X-ray that this report is about?

"A I looked at every X-ray and I can't specifically say anything about this one."

MR. CORCORAN: On that basis, Your Honour, I move that the prior questions be stricken, because --

THE COURT: We have a situation here where a doctor did an X-ray at his request, wrote a report; Dr. Cook, who is the witness being deposed looked at the X-ray compared the X-ray with the report and in some manner either found nothing to disagree with in the report or affirmatively agreed with it. One of the two; are we right?

MR. CORCORAN: So it's negative either way.

THE COURT: He did not disagree with it.

MR. CORCORAN: He didn't agree with it.

THE COURT: And he looked at the X-ray himself.

MR. BROWNE: In fact, it's already in evidence in the hospital records, Your Honour.

THE COURT: I know, but he says he looked at the records himself.

MR. BROWNE: That's right.

THE COURT: All right. The objection is overruled.

MR. BROWNE: Page 68, line 4:

"Q I think you said Mr. Mc Sweeney came back to you in August of 1971.

"A Yes, sir.

"Q Have you ever heard about him since then from any other doctor?

"A No, sir."

Line 16:

"Q Doctor, I think you expressed the view that there was a disc problem here in your opinion?

"A Yes.

"Q Is it also possible that there was nothing more than a back sprain?

"A Yes, that's possible.

"Q Are there tests that could definitively tell us where there is a -- " I think I meant to say "sprain". I think I did say "sprain, or disc problem."

MR. CORCORAN: Where are you reading from?

B53 MR. BROWNE: Line 22, or, 23.

MR. CORCORAN: Then I think you should read it as it appears.

MR. BROWNE: "Question: Are there tests that could definitively tell us whether there is a sprained disc problem?" That is what it says. My recollection is I said "sprain or disc."

MR. CORCORAN: I move that comment be stricken.

THE COURT: Well, it doesn't make sense that way, and it is entirely possible that this was a stenographic error. This was taken last week and has been typed up and not reviewed by the witness.

MR. CORCORAN: There is no proof of that, your Honor.

THE COURT: Well, I don't think it makes any difference either way. Let's go ahead.

MR. BROWNE: "Answer: There are tests which would help us define whether there was a nerve root compression.

"Q What sort of tests are you referring to?

"A We are talking about myelograms which are somewhat distasteful to many patients and not without some medical objection at times and also myelographs which are musculature and electro tests of the function of tissues.

"Q Were these muscle tests electrical tests?

"A No, they were not."

Again, I think that's a misreading.

MR. CORCORAN: I move that that comment be stricken.

THE COURT: All right, let's go on.

MR. BROWNE: "Question: Is there any danger in performing electrical examinations, electrical tests that you referred to?

"A No, sir.

"Q These tests were not performed?

"A No.

"Q Do you have the facilities to perform these tests here?

"A We have the facilities at the hospital. As a routine in 1970 -- I just wonder whether we didn't have them sent out. I don't recall. I am not sure."

MR. CORCORAN: Your Honor, that answer is an uncertainty, your Honor, and consistent with your Honor's prior rulings I request that the question and answer be stricken.

THE COURT: No, the purpose of the question was to determine whether tests were possible, and he says they were possible either in the hospital or in a private laboratory. That is what the essence of the answer is.

Overruled.

MR. BROWNE: Page 70, your Honor, line 17. Make it line 25, if I may.

"Q Are disc problems related to a predisposition of a patient?"

There is an objection.

"Q Do you understand my question?

"A I do, sir."

MR. CORCORAN: Excuse me. I press my objection. There is no proof of what predisposition of a patient means.

THE COURT: Well, the doctor apparently understood the question, so let's go ahead. The witness who was answering understood the question. Go ahead.

MR. BROWNE: "I think that you can say there are certain discs which certainly are on the basis of an abnormal spine to begin with, where the joints are not proper and don't give adequate support and therefore, throwing more pressure and throwing more stress on the annulus fibrosis. Then, there are others which seem to come out of nowhere on apparently perfect, normal spines.

"So that to answer you, I would say, yes, there are certain people who do have that predisposition and yet, there are some people who do have disc problems out of the clear blue sky.

"Q Do you often get disc problems without accidents, Doctor?

"A Yes.

"Q Is it true then that a normal, healthy person can have a disc problem even though you find no abnormality and even though he had no accident? Is that possible?

"A Yes, sir, it is possible.

"Q Is it a rarity, would you say, as disc cases go?

"A No."

I have nothing further at this time, your Honor. I would like to reserve my right to review the transcript.

THE COURT: All right. Do any other counsel want to read any other questions or answers?

MR. CAMPBELL: No, your Honor.

THE COURT: All right, we will recess for lunch-- Yes?

MR. CORCORAN: I want to read page 78.

THE COURT: All right, go ahead.

MR. CORCORAN: "BY MR. CORCORAN:

"Q Doctor --" and this was after Mr. McLaughlin and Mr. Browne had no further questions --

"BY MR. CORCORAN:

"Q Doctor, Mr. McLaughlin, the attorney for the defendant International Terminal Operating, asked you about certain tests including the straight leg raising and tendon tests. Are those generally known as neurological tests?

"A It is part of the neurological exam, yes.

"Q Is it your opinion that Mr. McSweeney suffered a herniated disc compatible with normal neurological signs?

"A I felt that this man had a nerve root compression, despite the fact that he had no neurological findings.

"Q Counsel had asked you about the positive tests that are customarily made to determine such an injury, and you were asked if a myelogram was made or was a myelograph electrical test used in both cases, and you said no.

"Now, in addition to your description of a myelogram as being distasteful, is it also dangerous?

"A It has some potential danger.

"Q That is if the test is not properly given?

"A Even if it is properly given and the patient is alergic to the oil that is used, or if that happens to be assocaited with an upper cranial problem, you can have a protrusion by doing a spinal tap. You can protrude the cervical brainchial contents into the upper part of the cervical spine. There are a number of things that can occur with a spinal tap and with the dye installation."

THE COURT: Now, before you get into that next question, let's give some thought to that. Will you look at the answer?

MR. CORCORAN: Yes, I have read the answer.

THE COURT: All right, then I think it inappropriate that you get into the question.

MR.CORCORAN: I respectfully disagree with your Honor.

THE COURT: All right. The objection is sustained.

MR. CORCORAN: "Question --"

THE COURT: Are you going down to line 25?

MR. CORCORAN: Yes.

THE COURT: All right.

MR. CORCORAN: "Question: In any event, they are not distasteful, but there is some danger?

"A It is not something you do as readily by any means, like a GI series or barium enema. It has to be done with a good deal of hesitancy."

Page 81.

"Q Doctor, I am inviting your attention to Defendant's Exhibit B for Identification and the page refers to a progress report as of February 1st, 1971, wherein it says, 'Thirty pounds pull on neck traction, HP, given simultaneously

"What does that mean, Doctor?

"A That is part of the physcial therapy department.

"Q What is that?

"A Hot packs.

"Q Is this 30-pound pull part of the traction?

"A It is minimum, heavy cervical traction for his neck.

"Q Is that to relieve the pressure of pain?

"A To stretch the muscles in the cervical spine, try to relieve the pressure there."

B54 Mr. Brown asked, "Can traction help a sprain of the lower back?

"THE WITNESS: Yes, it can by helping mobilize it. Actually, that is what really does it.

"Q Doctor, I am going to ask you one question with respect to Defendant's Exhibit B-1: Doctor, where you give a final diagnosis as post traumatic lumbo sacral sprain, possible herinated disc, is that in your handwriting?

"A Yes."

Nothing further.

THE COURT: Anything further?

MR. HOCKETT: No.

THE COURT: All right, we will stand in recess until 2:00 o'clock. Now, will counsel remain, please.

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(Jury leaves the courtroom.)

B553 THE COURT: Now, let the record show that the question you wanted to ask at page 79 was: "Question: Could it also cause a paralysis?

"A I don't see how, but I understand that there have been cases reported where there has been paralysis."

Now, given the doctor's answer and the absence of any inquiry as to any background as to why there might have been a paralysis in others, the accuracy of the reports, the source of the reports, I excluded that question and answer.

Now, what is the citation, Mr. Browne, of those authorities of the Court of Appeals that you wanted me to look at?

MR. BROWNE: Yes, your Honor, 250 F.2nd 710 and 124. And they hold --

THE COURT: Are they both in the same volume?

MR. BROWNE: Yes, sir. Two different cases.

THE COURT: Incidentally, Mr. Corcoran, do you rest at this point? Because I will give the jury a little longer lunch hour if you are going to rest.

MR. CORCORAN: Well, I would like to review my records.

THE COURT: Other than that. All right.

(Luncheon recess.)

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AFTERNOON SESSION

(In open court - jury not present)

THE COURT: Before we get the jury in, Mr. Corcoran, on the question of these doctors' bills, they have all been paid?

MR. CORCORAN: I have no knowledge that they were paid, that's why I'm offering them.

THE COURT: Well, the --

MR. CORCORAN: If they were paid, your Honor, I would be willing to, you know, not to offer them.

THE COURT: Well, the cases seem to say that if they have been paid on the maintenance and cure you may not bring them to the jury's attention and recover any money based on them.

Gentlemen, what is the story on these bills? Mr. Browne?

MR. BROWNE: Your Honor, all bills that have been presented to me have been paid. As far as I know they have all been paid.

Mr. Rudolph paid them directly and would be reimbursed by the insurer.

THE COURT: Mr. Rudolph, there is a--

MR. BROWNE: I have some notes on it, Judge.

There may be one or two that have not been paid because they have not been presented, but what has been presented has been paid.

THE COURT: There is a bill of a Dr. Cook in the amount of $430.

MR. BROWNE: I know that, that's been paid by somebody. Or Dr. Cook would have said something.

MR. CORCORAN: That's not an answer that he would say something.

THE COURT: There is an emergency care bill at the Long Island Hospital of $57.95. There is an Overlook Hospital bill in the amount of $692. There is a Dr. List bill in the amount of $45 and Dr. Gudelisdo's bill in the amount of $25.

Now, those are the five that we are talking about. The medicines in the amount of $50.

MR. BROWNE: Based on this letter that I have in my file, can you say what has been paid? Mr. Rudolph, these have all been paid; is that right?

MR. RUDOLPH: They should be marked paid with a check number and a date.

MR. BROWNE: And that one is.

MR. RUDOLPH: The Williams' bill for $26, that's definitely paid. Scotchwood Pharmacy.

MR. CORCORAN: What's Williams?

THE COURT: That's the back support.

MR. RUDOLPH: Scotchwood Pharmacy for $37.93, that's definitely been paid. Long Island College Hospital for $57.95, I would assume that it's been paid, but it's not marked. We would have to check further.

MR. BROWNE: This letter says it.

MR. RUDOLPH: According to the letter it was paid, however, I don't see that it's marked paid.

MR. BROWNE: In any event, your Honor, we admit liability for these bills. For any medical bills that have been testified to here, we acknowledge that we owe that money if it has not been paid. That's a question for the Court.

THE COURT: And you have gotten an acknowledgement without the jury. Without the jury you have an acknowledgement that these sums are owing if not paid, and Mr. Ruldolph, who is a responsible officer of the two defendants, Rudolph, is here and is making a statement on the record that to the extent those bills are not paid, they will be paid, and if they are not you may have judgment against Rudolph accordingly. Is that right?

MR. RUDOLPH: Yes, sir.

MR. BROWNE: Yes, your Honor. For all the

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treatments that have been testified to here. I believe they all have been paid.

MR. CORCORAN: In view of that concession, and since it is on the record, any reference to these bills on behalf of the plaintiff, I should say, were paid by the Rudolph Company.

THE COURT: Is there any objection to that, Mr. Browne?

MR. BROWNE: Is there any need to present this to the jury?

THE COURT: I don't think there is any need to present it to the jury.

MR. CORCORAN: I think so, your Honor.

MR. BROWNE: If they are --

THE COURT: Because the jury might infer from that, that that is a concession of liability on the part of Rudolph for the negligence or unseaworthiness, whereas, in fact, this is only an honoring of its obligation under maintenance and cure.

MR. CORCORAN: Well, we make that limitation at the concession.

THE COURT: No, because if you are getting it under maintenance and cure, then you are not entitled to get it any other way.

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MR. CORCORAN: But there is no proof that we have these bills paid.

THE COURT: Well, you don't need it.

MR. CORCORAN: Mr. Rudolph didn't say so.

THE COURT: You have a right to sue for what you are entitled to receive under maintenance and cure. Assuming that that is included in this complaint. And we are treating it as being included in this complaint.

Mr. Rudolph has confessed judgment to the extent these bills are not paid and, therefore, you may have judgment accordingly to the extent that they are not paid.

MR. CORCORAN: Well, then, I think that should be brought to the attention of the jury.

THE COURT No, I decline to do that because the inference from that goes way beyond anything that you are entitled to have.

MR. CORCORAN: Well, your Honor, you can instruct the jury that it is limited to their obligation under the maintenance and cure.

THE COURT: But there is nothing for them to decide. What reason do you want them to hear that fact?

MR. CORCORAN: Because at this stage, your Honor, I personally don't know that these bills are paid. I put them in my complaint as a proper item of damage.

THE COURT: I agree, but to the extent that they are not paid you may have judgment for them, and that's been awarded already by the Court on stipulation of Mr. Rudolph on behalf of both defendants Rudolph. So let's go forward on that basis.

MR. CORCORAN: Well, your Honor, I --

THE COURT: And if they are not paid, you may enter a judgment against the Rudolph Company and levy on that judgment.

MR. CORCORAN: I do not, if your Honor please, for the record, accept that concession which prohibits me from making any reference to it to the jury.

THE COURT: All right.

MR. HOCKETT: Before we bring the jury back, can we ask Mr. Corcoran whether he has rested at this point?

MR. CORCORAN: No, I'm going to offer evidence, and I will do that when the jury returns.

THE COURT: All right.

(Jury enters the courtroom.)

THE COURT: Yes, sir, do you have more evidence to present?

MR. CORCORAN: Yes, your Honor. At this time I would offer in evidence Plaintiff's Exhibit 8 for Identification, the same being the contract between the defendant,

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International Terminal Operating Company and the defendant, Yamashita Shinnihon Steamship Company Limited.

MR. HOCKETT: I have no objection, your Honor, except for relevance.

THE COURT: All right, received.

xx (Plaintiff's Exhibit 8 received in Evidence.)

THE COURT: Is there anything else?

MR. CORCORAN: I think, your Honor, that that constitutes all the exhibits offered by the plaintiff, and at this time the plaintiff rests.

THE COURT: All right.

Ladies and gentlemen, you have come in for a minute or so. I am going to give you some more exercise and ask you to retire to the jury room for a few minutes. We have matter of law to take up. The plaintiff has rested.

(Jury leaves the courtroom.)

THE COURT: Now, motions.

MR. BROWNE: Your Honor, I move to dismiss the complaint. The complaint must be founded either on unseaworthiness or negligence. The allegations of unseaworthiness, as far as defendants Rudolph are concerned, I think, have been limited, I hope, to two: That there was no tagline, and that there was an insufficient complement of men. One crosscuts against the other, so that when Mr. McSweeney B56 was asked if he needed a tag-line he said, not if there are enough men to help him. And he never said that Rudolph should have supplied more men.

In fact, he testified that Rudolph always supplied two men, and two men were an adequate complement, but that from time to time, I take it not every time, he would get help from others out of the control of Rudolph.

I think he said if he got that kind of help he didn't need a tag-line. I think the testimony, and there is only one bit of testimony here on this, there is very little factual conflict, the testimony was that, well, Joe, the harbor master, agreed to help and there is no testimony, and we did go into this on recross, there is no testimony that Joe, the harbor master, ever withdrew his offer of help.

So at least you have a seaworthy vessel until you get the thing standing over the pier. At that time, as far as Mr. Rudolph, as far as Mr. McSweeney knew, Joe, the harbor master, was standing in back of him. And there is no clear testimony that when Joe -- there is no testimony at all when Joe, the harbor master, should have rendered this assistance that he was supposed to render that he was going to render it or that he wasn't going to render it.

Then I tried to interrogate on the causal issue, because even if you have an unseaworthy vessel you have to have a causal relationship between the unseaworthiness and the accident. And I started interrogating Mr. McSweeney as to what should be done, what would the harbor master have done, and how would that have helped matters any. And do you know anything about the characteristics of 1500 pounds hanging on a cable, and how long it has been rotating, and so forth, and so on, and I was cut short very aptly and very correctly by Mr. Corcoran who said, well, Mr. McSweeney is not an expert, and that's true. I don't think Mr. McSween qualifies as an expert in that sense on anything.

So I think ou have a real lack of evidence as to whether or not more than two people were required. I think you have a real lack of expertise on whether or not a tag-line was required.

I think you have areal lack of testimony as to whether Mr. McSweeney made adequate efforts to get a tag-line. Remember, a tag-line is nothing more than piece of rope.

And I think you have inadequate evidence as to whether there was or was not help available, if help was needed. I think you have inadequate evidence as to whether there was any causal relationship between the lack of help or the lack of tag-line or whatever other defect is complained of and the accident.

Frankly, I don't see what anybody could have done.

THE COURT: Let me stop you a minute. Let me see if I understand you. You say that having gotten Joe, the harbor master, to say he would assist him that he then has an adequate number to do this job even by his own lights.

MR. BROWNE: That was his own testimony, I believe.

THE COURT: By his own lights.

MR. BROWNE: By his own lights, yes.

THE COURT: And therefore the ship was not unseaworthy in that there were sufficient people to do this task. This is vis-a-vis the number of people involved.

MR. BROWNE: Yes. I think that follows, you know, if you accept everything he says.

THE COURT: Which you have to.

MR. BROWNE: Which you have to at this moment, then you have to accept the fact that there were enough people and the real fault was that McSweeney never turned around and said, hey, Joe, you hold it over there. That he didn't do.

THE COURT: All right. Now then, let's go to the tag-line question. You are saying that, and if I remember his testimony correctly, Mr. Corcoran will correct me if I am wrong, or others will, I trust, his testimony was that if you had two people you did not need a tag-line.

MR.BROWNE: Yes, if you had somebody else.

THE COURT: If you had somebody else you didn't need a tag-line. If you were all alone the tag-line would be of assistance to him. In just what specific way is not clear, and just what connection it had with what difference it would have made in the nature of the pull or otherwise --

MR. BROWNE: That's another issue.

THE COURT: That is another issue. So if you had two people the vessel was not unseaworthy because of [illegible] absence of the tag-line, and you say the vessel was not unseaworthy by reason of an inadequate crew as a matter of law because the plaintiff had gotten a second helper.

MR. BROWNE: That is what it says.

THE COURT: Albeit from ITO which made up the deficiency of the crew and failed to use him.

MR. BROWNE: That's what I believe he testified.

THE COURT: Failed to use him and rendering the tag-line question irrelevant and rendering the ship seaworthy in that there was a second person who was available, but was not put to use.

MR. CORCORAN: Did you wish me to correct you now?

THE COURT: Well, didn't the plaintiff say that if he had two people he didn't need a tag-line? I'm pretty sure he did say that.

MR. CORCORAN: What he said was that he failed to use it. There is no proof of that.

THE COURT: No, I'm talking about the tag-line. My memory is the plaintiff said if there were two people for this job you didn't need a tag-line.

MR. BROWNE: That's my recollection of what he said, your Honor. Yes.

MR. HOCKETT: Yes. I believe I asked the question, in fact.

MR. CORCORAN: But, your Honor, if he says he needed two, he only had one, if he had the one. It was himself and two.

MR. BROWNE: No, it was --

THE COURT: No, it was himself and one other.

MR. BROWNE: He said himself and one or two others.

MR. CORCORAN: Yes. That would be three then.

MR. BROWNE: No, it would be two.

THE COURT: All right, I understand your view.

Go ahead.

MR. BROWNE: That is position No.1, your Honor.

Postition No.2 is that there is no proof of causal relationship. The thing was hanging there, it was rotating, like he says, I don't know whether it was or not, but I think he said it was, you are dealing with 1500 pounds of mass, your Honor, and there is no evidence, no earthly evidence that even a man of my size and substance was hanging on to it that that would have stopped it from lurching and twisting.

I tried to go into that because the only testimony is McSweeney's, I asked about, you know, about 1500 pounds of mass. That's a heck of a lot, your Honor, to move even if it is hanging freely. And whether or not there could have been a causal relationship, quite frankly, requires expert help, and we have on the record that Mr. McSweeney isn't competent to give us that help. And my interrogation on that issue was objected to on that ground to which I acceded, and I think you are lacking any proof of causal relationship between the alleged lurch and twist, and I know that your Honor, for the purposes of this motion, must omit the statement and must assume that there was a lurch and a twist, although I don't think your Honor knows why it lurched and twisted, there was some

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speculation as to the kinking, a twist, but it was pretty much speculation.

I don't think your Honor has any evidence of what caused it to lurch and twist except that speculation. But I defy anybody to tell from that record, unless he is an expert physicist, what could be done if the three of us were trying to hold that. So those are the grounds of my motion to dismiss at this time, your Honor.

Of course, I make the usual motions as to contributory negligence, etc.

THE COURT: What about the negligence? You say there was no proof of negligence here at all?

MR. BROWNE: I don't think the plaintiff is relying on the grounds of negligence.

THE COURT: Let me ask that of Mr. Corcoran. Are you relying on negligence against Rudolph?

B57 MR. CORCORAN: If your Honor read my requests to charge you would know that I do. I rely upon negligence.

THE COURT: What is the negligence that is alleged that you claim is in this record requiring the jury to pass on it?

MR. CORCORAN: Well, may I say this to your Honor, please, and I say it respectfully, would you like to hear the balance so I don't have to do this piecemeal?

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THE COURT: I think you ought to address each of these in turn so I can compare them.

MR. CORCORAN: It's the contention of the plaintiff that he was entitled under the general maritime law to a seaworthy vessel. It's the contention of the plaintiff that the R-5, with its crane and boom, was an extension of the lifting apparatus of the YAMAWAKA MARU. The YAMAWAKA MARU admittedly --

THE COURT: No, Mr. Corcoran, I'm trying to break this down. I'm going to get to that through another defendant, as I see it. But let's just focus on what Mr. Browne has said. He has said let's assume that the doctrine of seaworthiness applies, he says that there is no showing that this vessel was unseaworthy.

MR. CORCORAN: Oh, yes, definitely.

THE COURT: And he says you have two grounds for unseaworthiness, one is an inadequate crew for the tasks required, and the second is the absence of the tag-line.

Now, what about that?

MR. CORCORAN: What about that? I go further. I say, number one, the absence of a tag-line under the decided cases, particularly of this Circuit, definitely state that it's the duty of a ship owner to provide adequate gear, and adequate gear would include anything that has to do with the lifting.

THE COURT: I know, but these generalizations don't help me. We have got a particular case with a particular man, and am I correct that Mr. McSweeney testified that if you had two men working on this you did not need a tag-line?

MR. CORCORAN: That's not my understanding. My understanding was that two men in addition to himself. That would be three men.

THE COURT: If you had three men you didn't need a tag-line; is that your understanding of the testimony?

MR. CORCORAN: Well, he said he would need two more men, but I don't know that he also said that he wouldn't need a tag-line. I don't know that he said that.

But I do remember this, that the plaintiff stated that if there were other people there that they could help hold this block from twisting. Now, the failure of the R-5 to have a tag-line is the definite, concrete example of lack of gear. That's number one. The failure to have gear makes the R-5 unseaworthy.

Two, the failure to have adequate complement of men has been held to be a lack of seaworthiness referrable to the crew of a vessel.

Three, there was a lack of supervision. All of

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these items had been repeatedly stated as evidences of lack of seaworthiness.

THE COURT: Let me go now to the question of negligence. What is the negligence as opposed to unseaworthiness that you claim against the Rudolph companies?

MR. CORCORAN: Now, you may know, your Honor, that Mr. McSweeney is a member of a crew and under the Jones Act he is entitled to a safe place to work. So he has the right to have both doctrines apply to him. The doctrine of unseaworthiness and the doctrine of a safe place to work under the Jones Act.

THE COURT: Aren't they the same thing? You are talking about conditions.

MR. CORCORAN: No, they are not. The doctrine of seaworthiness emanates from the general maritime law. It's the work that was done in the sailing ship days of the loading and unloading.

THE COURT: I know, but I'm talking now about negligence law which requires some duty toward him of which the Rudolph people have notice and which they failed to perform. Now, what is that?

MR. CORCORAN: Their notice was the fact that they knew that there was to be a lifting of containers. They had worked on this vessel the day before. There was a stowage plan. There was a manifest. They knew all of the weights. They are supposed to know it.

Now, therefore, instead of having this R-5 come from the yard of the Rudolph plant with the proper hoisting and block equipment, it didn't do that. It provided him with insufficient gear.

THE COURT: Yes, but it is part of his job to make the gear susfficient; right?

MR. CORCORAN: Excuse me, your Honor. No. A vessel comes on the job site ready to work at 8:00 o'clock to lift the heaviest load, that's what Mr. Rudolph testified in a deposition that I read.

THE COURT: No, but it didn't. It didn't, and therefore he is competent, arguably, with good help, he is competent to take the four-part block that is on the deck and substitute it for the two. Now, how does that become negligence on the part of Rudolph?

MR. CORCORAN: I must say this to your Honor --

THE COURT: No, please.

MR. CORCORAN: You are arguing the weight of the evidence.

THE COURT: No, I'm asking you to give me a statement as to how you regard this as legal matter as negligence.

MR. CORCORAN: The failure to provide him with a safe place to work under the Jones Act is negligence. They have a duty to provide --

THE COURT: Well, what was unsafe about the place to work?

MR.CORCORAN: It was brought about by the lack of gear, by the lack of equipment, by the lack of complement of crew.

THE COURT: Unsafe to work?

MR. CORCORAN: Sure, at that point. Sure.

THE COURT: You mean when it's his job to change a block and he is in the course of changing it, that makes it unsafe to work?

MR. CORCORAN: Excuse me, Judge. The inability of one man to do this job makes it --

THE COURT: Well, that's another question.

MR. CORCORAN: Well, that's the negligence. The negligence. The failure to give him a vessel in the first instance that was properly manned, properly geared.

THE COURT: But that's a seaworthiness question, as I understand it, not a negligence question.

MR. CORCORAN: Yes, your Honor.

THE COURT: Or is it a mixed question?

MR. CORCORAN: Under the general maritime law of seaworthiness, and if perchance the failure to serve a safe place to work under the Jones Act, then they both apply.

THE COURT: Yes, but the safe place to work kind of thing is where there is grease on the deck, not where the man is asked to do something --

MR. CORCORAN: Oh, no. No, that isn't so, your Honor. It's not limited to grease on the deck, or the cover of a hatch, or anything like that.

THE COURT: All right, well, I understand your position. Go ahead.

MR. CORCORAN: What else is there?

THE COURT: So the negligence consists of no safe place to work; is that it? And why was the RUDOLPH not a safe place to work? Why was Rudolph's R-5 not a safe place to work?

MR. CORCORAN: By the failure of the Rudolph Company to provide him with the proper complement of men. The gear, namely the tag-line, and proper supervision.

THE COURT: I see. All right. Very good.

MR. CORCORAN: These are all questions, in my humble opinion, for the jury.

THE COURT: As of this moment, as to Rudolph, I am going to reserve decision on the motions to dismiss. Now, what about the vessel?

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MR. CAMPBELL: Your Honor, the defendant Yamashit Shinnihon Line moves to dismiss the complaint for failure to prove a prima facie case in that there has been no evidence of unseaworthiness at all as to the YAMAWAKA MARU.

There has been no testimony this vessel was unseaworthy as to its gear, its crew or anything to that effect

Secondly, your Honor, I don't think the way I read the complaint that there is any allegation of negligence as to this defendant ship owner. But, if there were --

THE COURT: Let me shift the burden to your adversary. Mr. Corcoran, why do you claim the vessel should be in this case?

B58 MR. CORCORAN: For the simple reason, your Honor, that there was a duty, as evidenced by contract put in evidence, No.8, that the Shinnihon Line was to provide the contractor, which in this case is ITO, with adequate gear. It said so. It took on a contractual responsibility.

Secondly, the proof is undisputed that the Shinnihon Line's YAMAWAKA MARU had a lifting capacity with its crane of 3-ton. Now, they had already ordered a vessel to pick up these containers which they knew to be in excess of 3-ton and hence when they ordered this crane this was an extension of the ship's gear, namely the R-5 --

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THE COURT: Well, that's a good question. I have been reading over the last couple of days such cases as Forkin against Furness and Sidnor against Vallain and Faszio. Those seem to indicate --

MR. CORCORAN: What's the citation, your Honor?

THE COURT: 323 Fed.Supp.850, and Victory Carriers against Law, which is 404 US 202.

Now, those cases seem to indicate that this equipment had not become an appertainence of the ship at this point. So even if it was as unseaworthy as all get out, it wasn't the YAMAWAKA MARU's unseaworthiness, it was the RUDOLPH's unseaworthiness.

MR. CORCORAN: Yes, sir, that's my contention.

THE COURT: Well, if that is your contention you are not hearing me correctly, because I was saying that it is not the YAMAWAKA MARU's unseaworthiness, that is what I said.

MR. CORCORAN: Oh, yes, I heard you, and I'm saying that it is. I'm saying that the YAMAWAKA MARU knows that it did not have sufficient hoisting equipment, it then went around and contracted to get the R-5. Now, that R-5 automatically became an extension of the ship's hoisting gear.

THE COURT: Well, these three cases I have recited to you do not support that legal theory, even assuming the facts, your facts, assuming the best of your facts--

MR. CORCORAN: And the fact is that their contract says that they have to provide all of this type of gear.

THE COURT: I understand that, but the question is whether that makes the YAMAWAKA MARU unseaworthy.

MR. CORCORAN: Yes, it does.

THE COURT: And it charges them with the duty. And I don't see it.

MR. CORCORAN: Let me say this to your Honor: The failure of the R-5 to have adequate equipment in the form of a tag-line extends to that same duty on the part of the YAMAWAKA MARU. This is one integrated operation. And the fact that they hire a sub-contractor to supplement their inasufficient gear, that doesn't insulate them from liability. If that were so, then every ship, all they had to do is just contract with somebody else and they are free and clear.

Well, that's not the law. It's not the law in Admiralty, and it's not the law under land cases. It's not the law in general tort that all a general contractor, or an owner has to do is just sub-contract the work out.

THE COURT: All right. Well, in any event I

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am going to grant the motion of the vessel for a dismissal on the basis of Forkin, 323 Fed.2nd 638 on the ground that it is not an appliance appertainent to the ship or part of the ship's gear under the facts and --

MR. CORCORAN: I say respectfully, your Honor, did you read my memorandum of law?

THE COURT: (Continuing) and 323 Fed.Supp.853. Your memo has been read.

MR. CORCORAN: And I certainly have cases there to support my theory. Definitely.

THE COURT: And Sydor and --

MR. CORCORAN: And I think, too, your Honor, at this stage of the case it's inappropriate, and I say this again respectfully --

THE COURT: No, I think it is highly appropriate in this case because I felt that the vessel should have been dismissed on your opening. But I didn't hear a word that should have caused them to sit here and defend in this case, so the vessel's motion to dismiss is granted, and what is the defendant's name? Yamashita Shinnihon Line is dismissed.

MR. CAMPBELL: Thank you, your Honor.

MR. CORCORAN: Exception.

MR. HOCKETT: If your Honor please --

THE COURT: Yes.

MR. HOCKETT: Representing ITO, at this time I would like to join my two colleagues in moving for dismissal of the cause of action, McSweeney against ITO, based primarily on the fact that ITO owed no duty to this particular individual as either an employer or ad hoc employer and, furthermore, ITO was not responsible for supplying either equipment of men to Mr. McSweeney, or to Rudolph to accomplish the task of changing the two to a four-part block on the day in question.

I think it goes without too much discussion that Joe Chuck was not the immediate supervisor of Mr. McSweeney, and in any event his role was restricted to actually allocating the place where the floating crane was to work and what holds of the YAMAWAKA MARU were to be filled with cargo at a given time.

It was not an intimate type of relationship whereby Mr. Chuck would actually direct the ins and outs and the intimate detail of the work that he had done, including changing of blocks.

In any event, your Honor, there is a further contention, there was no causal connection between the loud and abusive language that the plaintiff alleged to have occurred between Mr. Chuck or Mr. Maguilo and the plaintiff and the injury for which Mr. McSweeney is bringing suit.

Upon the direct and cross-examination of this particular witness, if my understanding of it is correct, indicated there was a twisting of the wires that caused the injury to his back. He did indicate that he needed one other man besides himself to accomplish the landing of this particular block without a tag-line. That he did receive an offer of help from Mr. Joe, the harbor master, another name we don't have. However, the help was not forthcoming and I submit, your Honor, that ITO was not under either a duty to supply this help nor was it put on notice or in any other way liable for help that was offered, but not in fact given at the time of the occurrence.

In any event, Joe, the harbor master's action, if the plaintiff's testimony is to be believed, is not within the scope of the man's authority within the employment relationship with ITO in any event. That ITO is not in the business to help Rudolph people changing blocks at the work site. And for those reasons, specifically --

THE COURT: Well, I suppose it is arguable, but I don't think it is relevant, it is arguable that these people help each other out from time to time.

MR. HOCKETT: Yes, I would submit that that wasn't brought out, but in any event --

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THE COURT: I was going to say even assuming that it is arguable that help was given across employer's lines--

MR. HOCKETT: And I would suggest further along that line that even if Joe, the harbor master, did in fact offer to help, Mr. McSweeney didn't wait to have the help tendered to him. And so whether or not his help or the absence of his help would have avoided this accident is highly speculative to say the least. And, for these reasons I would ask for a dismissal.

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THE COURT: Mr. Corcoran, what say you as to ITO?

MR. CORCORAN: Proof, uncontradicted, by the plaintiff is that Joe Chuck ordered him to change the block. He further testified, undisputed, that he takes orders from the pier superintendent. He further testified that for months on end he never sees Mr. Rudolph. Mr. Rudolph in his deposition testified that the pier superintendent has the authority to give orders to the crew. And he further detailed it by saying that the pier superintendent has the authority to change the block, order the change of the block.

THE COURT: Let me ask you this: I take my automobile over to the garage where I garage it and I pay a monthly fee, and I telephone the owner, the fellow that's in the little cubical in the garage, on a Saturday morning, and I say, Joe, would you bring my car over? All right, that's like an order. Same thing with Joe Chuck. He says, hey, Michael, move this barge down here a bit, we have got to do the next hold. I tell the garage fellow to bring my car over and on the way bringing it over he has an accident with it. Now, passing questions of my insurance and things like that, have I, aside from insurance law, have I got any responsibility for that accident because I have ordered him to do it? Isn't that the same thing?

MR. CORCORAN: Your example, your Honor, I can say is a poor one when compared with the Admiralty law and the law pertaining to ships. We are not concerned with some garage owner.

THE COURT: What is a question of control or ordering somebody?

MR. CORCORAN: The proof is undisputed from all sources. The plaintiff, Mr. Rudolph, that he told him what to do, he told him to change the block, and Rudolph confirms that. And we have nobody from --

THE COURT: Mr. McSweeney has said that changing the block was his business. Joe Chuck says that block of yours, Mike, isn't going to lift that container. Change it. Mike says, okay. Now, is that --

MR. CORCORAN: You're taking it out of --

what you are saying, Judge, and I am saying it again respectfully, you are doing what my old professor used to say, you are arguing the weight of the evidence. There is a jury question, and the ITO--

THE COURT: Let's go on to the next one, because I understand that point. Is that all you want to say on behalf of ITO, that Joe Chuck ordered him to do it? Is that the only reason you are giving?

MR. CORCORAN: Oh, no. No. If you read the item, Exhibit 8, he is under a duty to provide this supervision. He is under a duty to provide this help. He is under a duty to provide this gear. Plus the fact --

THE COURT: Not as to block changing. I don't see that at all. I don't see any --

MR. CORCORAN: Number one, at this stage of the case we don't have one scintilla of evidence from the defendants of anything what they were to do other than what Mr. McSweeney said, undisputed, that he was ordered by the superintendent to change the block. Now, let me --

THE COURT: But changing the block is his business as an independent contractor, and --

MR. CORCORAN: Follow me on this, if you will, Judge. ITO has the job of putting the cargo aboard the ship. In connection with that duty for which it is being paid as the stevedore it has to use all reasonable means to bring that about.

Now, if, perchance, the hoisting equipment is insufficient and his object is to continue the mission of the ship on its voyage fully loaded, pursuant to the stowage plan, then Mr. Chuck, as the pier superintendent of 21 years, representing ITO at this pier where they have an office year-round, that he is under a duty to take whatever means there is to get the ship loaded.

That's his ultimate objective, that's the goal, that's the mission that he is to perform on behalf of the vessel. And hence he testified according to the deposition that --

THE COURT: Yes, but if Mr. McSweeney couldn't have done the job he himself was forthright enough to say if he couldn't have done the job he would have said, Chuck, I can't do it until I get some more people, and don't bug me, I'm going down to the luncheonette and have a cup of coffee until they come.

MR. CORCORAN: Again, you are making a serious error.

THE COURT: No, I'm not going to charge --

MR. CORCORAN: That's a question of fact for a jury.

THE COURT: I'm not going to charge ITO as a matter of law with that kind of responsibility under these circumstances.

MR. CORCORAN: You will have to hear me out just on this one point. The deposition of Mr. Chuck -- Mr. Maguilo is that the number of people in the gangs and the number of gangs depends upon the steamship company.

THE COURT: That has nothing to do --

MR. CORCORAN: Yes, this is all part and parcel. The amount of people that is to be used, the type of equipment that is to be used, and if your Honor reads Exhibit 8 you will see that he has that responsibility.

THE COURT: Mr. Corcoran, you are really not being helpful to me and time is passing. I have read the pretrial order here very carefully. You claim one item of responsibility against ITO is that there was harassment of Mr. McSweeney by Mr. Chuck.

MR. CORCORAN: Absolutely.

THE COURT: Now even assuming that what was said to him constitutes harassment on the pier, and frankly I think it was mildly phrased from what I understand of the language that is frequently used on the piers, although Mr. McSweeney may have toned it down some himself, but if that was what was said to him, that was rather polite talk as I feel it.

In any event, that harassment I find to have no proximate cause whatsoever to this injury. If you find, if the other item is that there was a failure to assist him I do not find a duty to assist him on the part of any ITO person, but even if there was a duty to assist him the person who said he was going to assist him was standing somewhere out of his sight, and Mr. McSweeney made no effort whatsoever to use him.

If he said he needed help and the fellow was back there he should have said, Joe, harbor master, where are you? I need you up here. I don't need you back there. Get up here.

He made no effort whatsoever to use him and, therefore, I find that that is not a proximate cause of any injury.

MR. CORCORAN: Judge, he said he thought he was in back of him.

THE COURT: I know, but he made no effort to call him and say, I need you to --

MR. CORCORAN: He was afraid to do anything with this Joe Chuck --

THE COURT: Now finally you said that ITO hired an employee who was neither civil nor competent. Now, I don't find that he is uncivil, as a matter of law, or anything else, or that the jury could find that he was uncivil. Nor is there any proof whatsoever charging ITO with knowledge that it had an uncivil or an incompetent employee, and until you have proved that they had an incompetent or an uncivil employee and knew it, then they are not responsible for him, and in any event, I do not find that there was any proximate cause from this alleged incivility, or incompetence, even if it existed.

So I am going to grant the motion of ITO to dismiss.

MR. CORCORAN: Let me have this statement as part of this motion. Mr. McSweeney testified that he as being harassed, intimidated, coerced by Joe Chuck. Joe B60 Chuck, according to his deposition, was complaining that he had gangs of men waiting, standing idle, and hence that conduct on the bossman on the pier, when seen and observed by Joe, the harbor master, he retreated from any offer because Joe, the harbor master, did not want to get involved.

THE COURT: Well, we don't have any proof of that, either.

MR. CORCORAN: Then we don't have any proof of what your Honor said.

THE COURT: All right, I have granted the motions to dismiss as to ITO and you have an exception.

All right, do you want to get the jury in and we will go on with Rudolph's case.

I am going to reserve decision.

MR. HOCKETT: May we withdraw, your Honor?

THE COURT: Yes. All right, we will have a short recess.

(Recess)

(In open court - jury not present.)

THE COURT: Before we bring the jury in I just want to clarify one thing and make one further ruling.

On the dismissal as to the vessel, I want it to be perfectly clear that it is my finding that the high watermark of the facts reveal that the R-5 was not yet in the process of loading the vessel and therefore had, by no stretch of the imagination, become an appertainence of that vessel.

Now, second, I am going to grand Rudolph's motion to dismiss the negligence aspect of this case. I don't see that any negligence could be pieced out from this jury on the facts that it has heard.

That leaves me with a decision reserved on the seaworthiness aspects which I feel must be sumitted to the jury on the state of this record.

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All right, go ahead, Mr. Browne.

MR. CORCORAN: May I make some comment, your Honor?

THE COURT: I don't think any is needed. Bring in the jury, please.

MR. CORCORAN: On the question of the R-5 had not yet started, the very fact it was changing the block, that's part of the start.

(Jury enters the courtroom.)

THE COURT: Ladies and gentlemen, before we start defendant Rudolph's case, I want to say to you that for reasons that have nothing to do with your functions whatsoever as fact-finders, I have withdrawn from you any consideration as to any issues between the plaintiff and Yamashita Shinnihon Line and any issues as between the plaintiff and International Terminal Operating Company, and you will not have to consider any such issues of fact as between those parties. Those are withdrawn.

All right, Mr. Browne, go ahead.

MR. BROWNE: Your Honor, I call James Rudolph.

JAMES ARTHUR RUDOLPH, called as a witness on behalf of defendant Rudolph, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BROWNE:

Q Mr. Rudolph, when did you begin work for either of the companies that are involved in this lawsuit?

A In 1969.

Q What were you doing then? Was this your first work in the maritime business?

A Full-time, yes.

Q What was your background before that in the maritime business?

A Well, I worked for the family corporation during my high school summers, college summers, and I was in the service three years as a lieutenant in the Transportation Corps.

Q Did that involve any cargo handling, cranes and whatnot?

A Yes, it did.

Q Then you got out in 1969 and you went to work for the companies that are involved in this case?

A That's correct.

Q In November of 1970, who was running the company?

A My father, Arthur J. Rudolph.

Q Is he dead now?

A Yes.

Q What position did you have?

A I was really his assistant. I think I had a title, treasurer.

Q Did you get involved in the day-to-day operations of assisting your father in running the company?

A Yes, I did.

Q Did you know Mike McSweeney?

A Yes.

Q How long had you known him?

A I knew him when I was working part-time for the corporation. I would say five years.

Q Were you familiar with the cranes that the corporation had?

A Yes.

Q With their equipment?

A Yes.

Q Were you familiar with the operation of the crane?

A Yes.

Q Had you ever seen anybody change a four-part -- a two-part block and put on a four-part block?

A Yes.

MR. CORCORAN: Objection.

THE COURT: Overruled. I assume that the foundation is subsumed here that these are the same size two and four-part blocks that we are talking about.

MR. CORCORAN: That's exactly the reason for my objection. There is no foundation and I don't know why the Court assumes to take it upon itself to assume that there is such a set of facts. No proof has been offered.

THE COURT: Well, these ships have been in the Rudolph business for some time, but I did have a sensitivity for your feelings and I trust we will get that question answered.

Q When I asked you about changing from a two-part block to a four-part block, are you familiar with the blocks that were on the R-5 in November of 1970?

A Yes.

Q Have you seen blocks similar to those being changed?

A Yes.

MR. CORCORAN: Objection, your Honor.

THE COURT: On what ground?

MR. CORCORAN: There is no foundation here. These are all generalities. We have no proof that the blocks that were changed on the R-5 were the same.

THE COURT: What is the comparison --

MR.CORCORAN: These are merely conclusions.

THE COURT: (Continuing) Mr. Rudolph, between the blocks you saw and the ones on the R-5?

THE WITNESS: Your Honor, there were only two blocks in question on each crane, so it's two standard blocks.

THE COURT: They are standard?

THE WITNESS: Yes.

THE COURT: But they are all approximately the same size and weight; is that it?

THE WITNESS: Yes, sir.

THE COURT: Very good. All right, go ahead.

BY MR. BROWNE:

Q How long had the R-5 been in your business?

A The R-5 was built in 1961.

Q What about the R-6?

MR. CORCORAN: Objection.

THE COURT: Overruled.

MR. CORCORAN: But it's not in the case, your Honor.

MR. BROWNE: There are pictures of it in the case.

Q The R-6, when was that built?

A In 1963.

Q What was the usual complement of these vessels when they went out to a job?

A As far as crew?

Q Yes.

A Two-man crew.

Q Was that decided pursuant to any document or agreement?

MR. CORCORAN: Objection. Calling for --

A That is pursuant to the union agreement that we have.

Q Does that situation still pertain to this day?

A Yes.

Q Is there a crane larger than the R-5 in your control?

A Yes.

Q Which crane is that?

A The R-12.

Q What is the usual complement of that crane?

A Two men.

Q Is that also pursuant to the union agreement?

A Yes.

MR. CORCORAN: Objection. Objection. There is no proof as to what the union agreement is. This is all conclusary. There is no foundation and your Honor required me to submit proof of foundation before a witness could give a conclusary answer. I submit that this witness is not laying a foundation.

THE COURT: He is not competent to say whether the union agreement provides for a two-man crew on the R-12; is that your objection?

MR. CORCORAN: My objection is, your Honor, there is no foundation for this generalization, these general answers.

THE COURT: Overruled. Go ahead.

Q You are familiar with the union agreement, are you not?

A Yes, I signed it.

Q What is your position now with the company?

A Vice-president.

Q Who is effectively the operating head of the company now?

A I am.

Q How long have you held that position?

A Since my father's death in 1972.

Q Is there any president?

A No.

Q Are you familiar with all the employee of your company?

A Yes, I am.

Q How many cranes do you have?

A We have six at the present time.

B61 Q When you were seeing these blocks changed, have you ever been in a supervisory capacity in connection therewith?

A Yes.

MR. CORCORAN: I submit, your Honor, that counsel, from the commencement of this examination, has asked leading questions, and I was not permitted to ask leading questions, and I am objecting to them and I ask that counsel be admonished to ask right questions.

THE COURT: Overruled.

MR. CORCORAN: On a fact basis.

THE COURT: Overruled. Go ahead.

MR. BROWNE: Would the reporter be good enough to read back my question.

THE COURT: Were you in a supervisory capacity when you were watching these blocks changed?

THE WITNESS: Yes.

Q Is it usual -- strike that -- is it good practice, in your opinion, to have one man land a block?

MR.CORCORAN: I object, your Honor.

A Yes.

MR. CORCORAN: I object. There is no foundation of what the practice is, much less good practice.

THE COURT: Yes, I will sustain that objection.

Q Is it usual, when you wait for the decision, eventually we will get there -- is it customary and usual -- I'm just going to limit my question now to the landing, not the chaining of the blocks, just the landing of the four-part block on the dock, or on the deck -- on the dock, I'm sorry. And how you go about that.

Was it customary and usual in your experience for one man to guide and land that block on the deck?

MR. CORCORAN: I object on the ground of form. He has three questions in one, and then also it's -- it has the infirmity of asking what's the usual practice. There has been no establishment of it.

THE COURT: I think you had better lay a better foundation, Mr. Browne. This gentleman's observations and experience in this particular record. Sustained.

Q How many times have you observed the changing of blocks?

A I think it's very difficult to put a number on it, but I would say many, many times.

Q Could you give me a number of times a year?

A That I personally have observed it?

Q Or the number of times a month.

MR. CORCORAN: I want my objection because when he is saying change of blocks he doesn't say when, under what circumstances, and so on.

THE COURT: Overruled. Mr. Rudolph, you are in and around the pier where your vessels are located from time to time; is that right?

THE WITNESS: Yes, your Honor.

THE COURT: You see people, you see your employees changing the blocks?

THE WITNESS: Yes, sir.

THE COURT: How frequently do you see them changing the blocks?

THE WITNESS: Approximately once a month, or once every two months.

THE COURT: And for how long a period have you been observing this?

THE WITNESS: Since I started with the corporation in 1969.

THE COURT: So on the basis of approximately nine times a year, that's 63 times approximately.

THE WITNESS: Yes, sir.

THE COURT: You have observed these blocks being changed. All right, go ahead.

BY MR. BROWNE:

Q Is it in your opinion, sir, and your experience, is it good practice for one man to land, or to guide the four-part block in landing on deck?

MR. CORCORAN: Objection. That's the very question this jury is called upon to answer, and not this witness. It's not within his province. That's the very question the jury is asked to determine, whether it was proper.

THE COURT: I suggest you make the question read, what has he observed the practice to be.

Q What have you observed as general practice? How is it usually done?

A Well, it's usually done with one man guiding the block down and positioning the block on the dock.

Q Does he usually use a tag-line?

A No, he doesn't.

Q Is a line used -- let me go to the overall process now, not just limiting it to the landing of the block, but is there a line that is used in changing from a four-part block to a two-part block, or vice versa?

A There is generally a line used.

Q All right. You have answered my question. What is it used for?

A It's used to pull the cable through the sheaves.

Q And this is after the thing is laying on the deck?

A After the block is positioned on the deck, yes.

Q Would you describe that line to me.

A Well, it's a piece of line generally of the same diameter as the cable, and the line is fed through the block and there is what we call a Chinese finger on one end where the cable is attached to the line, and the line is pulled through thus pulling the cable through the block.

Q Sort of like a woman's needle threader?

A Yes. The theory being it's easier to thread the rope than the cable initially.

Q The hatches on the R-5, sir --

THE COURT: Just as a matter of clarity here, Mr. Rudolph, I take this block is a thing about like so (indicating), maybe a foot and a half, two feet across; is that right?

MR. CORCORAN: If your Honor please, I object to your Honor's question, and let the witness describe it. That's a leading question, even on the part of the Court to do that.

THE COURT: Well, we have a photograph so I don't think I am leading anybody.

Now, what is the idea, is it to lay that down on the dock on its side so that the cable can be put through the appropriate pulleys in the block and through the appropriate pulleys on the top of the crane until you have got all the loops in, and then you lift up the boom and you are back in business? Isn't that what it amounts to?

THE WITNESS: Exactly.

THE COURT: All right.

MR. CORCORAN: If your Honor please, I move that your Honor's question be withdrawn as leading, and since this is a critical part of this case I respectfully submit that the questions should be put to the witness on a factual basis, not on a conclusary basis.

THE COURT: Overruled.

BY MR. BROWNE:

Q In turning to the hatches on the deck of the R-5, I ask if all of them are kept sealed. Going back to November 14th, 1970, if you remember.

A When you say sealed, you mean permanently sealed?

Q Yes.

A No. There are a few hatches which are accessible.

Q Are there generally on the vessels that you send out pieces of rope?

MR. CORCORAN: Objection, your Honor. There is no foundation.

THE COURT: Yes, sustained. Well, no, I will overruled that.

MR. CORCORAN: But he says generally. What are we talking about? The six cranes he has got? When? Where? At what pier? Under what circumstances?

There is no foundation. You did not allow me on my direct examination --

THE COURT: Sustained. I will sustain the objection.

MR. BROWNE: Well, Judge, the only person who says, if I may, they didn't carry a piece of rope, or have a piece of rope available is Mr. McSweeney, and we have that unsupported testimony which apparently --

THE COURT: Well, he says that there was --

MR. BROWNE: That there was no rope anywhere to be seen.

MR. CORCORAN: Well, that's supportive.

MR. BROWNE: I have no direct testimony to contradict that. But I think that -- well, let me try a few questions.

Q Was it customary and usual to have pieces of rope available aboard vessels, in your experience?

MR. CORCORAN: Objection.

THE COURT: Yes, I'm going to sustain that.

Q Was it customary to have pieces of rope aboard the R-5, in your experience, in 1970?

MR. CORCORAN: Objection, unless there is a foundation laid that he was there. These are all conclusions.

MR. BROWNE: He wasn't there.

MR. CORCORAN: If he was not in then, I submit he --

THE COURT: I will sustain the objection.

Q Would the R-5, during the year 1970, before November 14th?

A I would have to say yes.

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MR. CORCORAN: Then under those circumstances, your Honor, he says he would have to say yes, it's not a definitive answer in accordance with your Honor's rulings.

THE COURT: What is your best recollection, Mr. Rudolph?

THE WITNESS: I'm afraid it's too far back to say yes -- to say no, but I would assume yes.

MR. CORCORAN: Then I move that his answer be stricken.

THE COURT: Do you have a practice of visiting the vessels?

THE WITNESS: Yes, I do.

THE COURT: What is the practice?

THE WITNESS: It's really whenever I can, but it's not a set time.

THE COURT: In accordance with your practice, how frequently do you visit each of your vessels?

THE WITNESS: That's a very difficult question to answer.

THE COURT: In the course of two or three months do you get to each one of them once?

THE WITNESS: Yes.

MR. CORCORAN: I object to the question and the form of the question. The witness has said it's very difficult for him to answer.

THE WITNESS: In order to give my best answer, my best judgment would be, I would say, each crane maybe six, seven, eight, ten times a year, minimum. And maybe more -- certain cranes more than others.

THE COURT: All right.

BY MR. BROWNE:

Q When you went aboard the vessel, did you look to see if the ordinary equipment was there?

MR. CORCORAN: Objection, when he says the vessel. We're not interested in the vessel --

Q The R-5.

MR. CORCORAN: Unless this witness can say a time and place, I object to the question. It's too general, it's conclusary. The witness' recollection, he says is difficult, and it's just general --

THE COURT: I will sustain the objection to the form of that question.

Q When you went aboard the R-5, as you advised his Honor, in 1970, would you look to see if the ordinary gear was there?

MR. CORCORAN: I object unless this witness can tell this Court and jury when it was and where it was. This witness is not competent to answer.

MR. BROWNE: Your Honor, I recall Mr. McSweeney's testimony that there was no tag-line, and --

MR. CORCORAN: No, he is arguing the weight of the evidence and --

THE COURT: Let's not get into arguments on the evidence itself. The witness said he had a practice of visiting every vessel some half-dozen times a year. Do you have any recollection of going aboard the R-5 in 1970 prior to this accident, among other vessels?

THE WITNESS: Yes.

THE COURT: You do. All right, now what did you observe at those times with regard to the vessel's equipment, if anything?

MR. CORCORAN: Objection, because now we should have the date and place where he went aboard.

THE COURT: No, no. He can't remember that, and he has already said so.

MR. CORCORAN: Then you are giving him the freedom to answer generally. That's not evidence.

THE COURT: The jury can appraise his testimony in its total picture.

MR. CORCORAN: Well, I submit it's objectionable.

THE WITNESS: Generally, I would look at the general condition of the crane and the general gear that's on the vessel.

Q When you made these inspections --

MR. CORCORAN: Objection. There's no proof that he made any inspections.

Q When you did what you said you just did, did you see rope aboard the R-5?

MR. CORCORAN: Objection as to time and place.

THE COURT: Overruled.

MR.CORCORAN: Well, when was this?

THE COURT: Overruled.

A Yes, rope would be a normal part of the crane's equipment.

MR.CORCORAN: I object to the word "normal." We have no standard of what constitutes normal.

Q Going to the line that you referred to used to reave the Chinese fist, or something, you used it to reave the blocks after the thing was laid down, would you tell me how long that was, sir? How long that piece of rope was?

MR. CORCORAN: What rope? Excuse me, your Honor, there is no identification of any rope as to time and place.

THE COURT: This is the one that he says was used to reave the cable through the block.

MR. CORCORAN: When?

THE COURT: As to which he testified. He said that's standard equipment, as I understand.

THE WITNESS: Well, it's standard equipment on certain cranes. It's really that particular rope that we were referring to which pulled the cables through, it's something in which to aid the oiler reave the blocks. If he didn't wish to use it, then he could certainly push the cable through, but that's really personal preference with each oiler and I wouldn't want to say that each crane was equipped with that particular device.

MR. CORCORAN: Then I move that it be stricken because he now says definitively that he doesn't know whether it was on the R-5.

THE COURT: Yes, we will strike that out. Go ahead. Disregard it, ladies and gentlemen.

Q You met Mr. McSweeney on the afternoon of November 14, 1970, did you?

A Yes. Either the afternoon or the morning, I'm not quite sure of the time.

Q And you spoke to him?

A Yes.

Q Where did you meet him?

A I believe I picked him up at the hospital. The Long Island College Hospital.

Q What did you do when you picked him up?

A I brought him to my car and drove him home.

Q Did you speak to him?

A Yes.

Q Did you ask him what happened?

A Yes.

Q Did Mr. McSweeney tell you that the --

THE COURT: No, ask him what he said.

Q What did Mr. McSweeney say?

A Mr. McSweeney said thathe hurt his back in the lower area.

Q Did he say what happened?

A He said that he twisted, and apparently his back went out and he fell to the dock.

Q Did Mr. McSweeney tell you that the block twisted or lurched?

A I don't recall that he said that.

MR. CORCORAN: Then I move that the question and the answer be stricken.

THE COURT: No.

MR. BROWNE: I have no further questions of Mr. Rudolph.

CROSS-EXAMINATION

BY MR. CORCORAN:

Q Mr. Rudolph, in the years that Mr. McSweeney has been an employee of the Rudolph companies, has he been a faithful employee?

A Yes.

Q Has he rendered services to the Rudolph companies to the best of his ability?

MR. BROWNE: Objection.

THE COURT: Sustained.

Q Has your late father, Arthur Rudolph, and your uncle, did they have a similar high regard for Mr. McSweeney?

MR. BROWNE: Objection.

THE COURT: Yes, sustained.

Q Do you know if your father had a regard for him?

MR. BROWNE: Objection, your Honor.

THE COURT: Yes. Sustained. We're dealing not with characterizations here, we're dealing with facts.

MR. CORCORAN: We are also going to credibility, your Honor.

Q When you talk about this rope, you're not talking about the tag-line that they put on the load when it's being hoisted or extended, you're talking about the rope that goes through the sheaves of the block to pull the cable through; isn't that what you're talking about?

A That's correct.

Q And you make no mention about a tag-line which is tied onto a load either when it's being hoisted with a signal going up or a signal going down, you're not talking about that tag-line?

A No mention at all.

Q Right. Now, do you know this fellow called Joe Chuck?

A Yes.

Q You know him for years, do you?

A Yes.

Q He is the pier superintendent of the ITO?

A Yes.

Q Have you ever seen him in the course of his work?

A Yes.

Q Does he tell the crane where to load the cargo with respect to Hatch No.1, 2 or 3, or whatever it is? Referring, of course, to the stowage plan?

A I don't think he personally does it, but he is in charge of it, yes.

Q Ye. He is the overall boss on the pier?

A That's correct.

Q He has hatch foremen and ship foremen and gangs of longshoremen, doesn't he?

A Correct.

Q Been with them for 21 years?

A I wouldn't know how long.

Q Now, the R-5, it had a certificate on board showing what the lifting capacity of the vessel was; isn't that so?

A Yes, it should have.

Q And that's require under federal law, to show its lifting capacity?

A Yes.

Q With regard to the R-5, Mr. Rudolph, do you have any independent recollection of that vessel as to what equipment it had on it on November 14, 1970? I'm not talking about generalizations, do you have any independent recollection of what gear was on that vessel?

B63 A Talking about all the gear on the vessel?

Q Yes.

A It would be impossible to state.

Q Did you make any record of what was on that vessel on November 14, 1970?

A No.

Q Where was the R-5 prior to arriving at Pier 6 on November 13, 1970?

A I believe it was in Port Newark.

Q And howas it brought from Port Newark to Pier 6 in Brooklyn?

A It would have been towed by one of the tugboat companies.

Q And was it towed unmanned, without a crew?

A Normally that would be the way to do it.

Q Was the R-5 engaged by the Japanese vessel, the Shinnihon Line, the Yamashita Shinnihon Line?

A Yes.

Q Prior to engaging it, did they give the Rudolph Company a copy of the manifest showing what the cargo was?

A No.

Q Do you know what weights were to be lifted by the R-5 on November 14th?

A I can't recall.

Q Do you remember testifying at a deposition that the block that was set up on the R-5 for November 14, 1970, had a lifting capacity of 18 tons?

A I don't believe I said that.

Q What did you say?

A Well, you mentioned on the 14th? I think that was the day that we were putting the four-part block on.

Q I see. So what would it be on the 13th?

A On the 13th the crane was rigged with the two-part block which would be 18-ton, yes.

Q Had you been informed by the Yamashita Shinnihon Line that you were going to lift cargo of 15 tons?

A Well, when you say me --

Q I mean Rudolph.

A I believe yes, we were informed that the maximum lift would be 30,000 pounds, as I recall.

Q And that is why the Rudolph Company then brought the R-5 with the two-part block?

A Yes. For the 13th. To work on the 13th.

Q When did the Rudolph Company learn that the R-5 was insufficiently rigged to hoist the cargo of the Japanese vessel?

A I don't know.

Q You weren't on Pier 6 in the morning, were you?

A I could have been.

Q You don't know?

A I don't know.

Q As a matter of fact, when the two-part block was found to be incapable of hoisting the 25-ton containers, there were 25-ton containers there, weren't there?

A For which day, Mr. Corcoran?

Q That would be for the 14th. November 14th.

A For the 14th, yes, I believe the heaviest lift was 50,000 pounds.

Q And, of course, the two-part block wouldn't lift that, would it?

A No, it wouldn't.

Q You wouldn't allow that?

A I wouldn't allow it.

Q And if Mr. McSweeney testified that Joe Chuck told him to change the block from two to four-part, would you find any fault with that?

A No.

Q You know that the pier superintendent has that authority?

A Yes.

Q When the Rudolph Company furnishes a crane, where does it get the information as to what the heaviest lift will be? Is that from the ship?

A Generally from the person that gives the order.

Q And in this case do you know who gave the order?

A Yes, I believe it was Sal Agro.

Q And who is he?

A He would be the Port Captain for Texas Transport & Terminal.

Q And Texas Transport & Terminal is who?

A They would be the agent for Yamashita Shinnihon.

Q So including the vessel, it was giving the orders through the intermediate of Sal Agro and the Texas Transport, and the Port Captain; is that right?

A Yes.

Q If I were to read you this question: "Question: Do you know if the crew of the floating rigs of the Rudolph Company, particularly the R-5, are required to take orders for changing blocks from orders given to them by the pier superintendent?

"A In some cases yes.

"Q Since you qualified that 'in some cases', in what cases do they?

"A When it's pointed out that the lifting exceeds the capacity that they are rigged for. They have the authority to go ahead and rerig them and make it known to the office at a later date.

"Q Is there an additional charge for that rerigging?

A It could be."

Were those questions asked of you and did you give those answers?

A Yes, I did.

MR. CORCORAN: May I have just a minute, your Honor?

THE COURT: You may.

Q Mr. Rudolph, do you usually get a copy of the stowage plan or the pre-stowage?

A No.

Q To whom is that stowage plan given?

A I wouldn't know. We don't get a copy of it. I assume it's between the steamship company and the terminal operating.

Q Which would be between Yamashita, or the

YAMAWAKA MARU, and the ITO?

A I believe so.

Q Well now, the Court asked you, Mr. Rudolph, if you visit the piers from time to time, and mentioned from time to time you do.

A Yes.

Q Do you have an independent recollection of having visited the pier on November 13th or November 14, 1970, and view the cargo that was to be put aboard the YAMAWAKA MARU by the R-5?

A I can't say at this time that I have an independent recollection of that, no.

Q When you say, at this time, did you have it at any other time?

A I'm sure if you asked me this question three days after the accident I probably could give you a much better answer.

Q I see. Thank you very much, sir.

Have there been occasions, Mr. Rudolph, when you saw Mr. Chuck hollering and shouting at crane operators?

A At my crane operators?

Q Yes.

A No, I couldn't say that.

Q Well, did you make an answer that it was done?

Do you remember giving us that answer?

A No, I don't.

MR. CORCORAN: I will need a minute, your Honor, to pick this question out.

THE COURT: All right.

Q When a block such as the one that was on the R-5 on the morning of November 14th --

MR. BROWNE: Excuse me, your Honor. Is there going to be reference to a deposition?

MR. CORCORAN: Yes, I am going to try to find it, Mr. Browne.

Q (Continuing) which was a two-part block, isn't that so, on the morning?

A Yes.

Q You saw it, as a matter of fact, did you not?

A I don't believe I went to the pier. I believe I went directly to the hospital to pick up Larry.

Q Well, is the two-part block the regular block that's on the R-5 that was on that day?

A Two regular blocks. We have the four-part block and the two-part block.

Q Yes. I show you Plaintiff's Exhibit 1 in Evidence and ask you to look at a block on the R-5 and tell us is that the two or the four-part block (handing)?

A I don't want to confuse anybody, but that is a five-part block.

Q Five-part?

A Yes. It is basically the same block as a four-part block, but it reaves up one more part.

Q But it is the same as the four-part block except it has five cables instead of the four?

A That's correct.

Q Mr. Rudolph, in your experiences in connection with the manning of the cranes, have you ever supplied help to change the rigging?

A In what case?

Q Well, in cases, say, to change it from a two to a five-part of two to a four-part block. Incidentally, the cable that is used, how long is that?

A I believe the four-part cable is somewheres around 500 feet.

Q Five hundred feet. And what is the diameter?

A One inch.

Q And having that type of cable in mind on a four-inch block 500 feet in length, would you say a one-inch cable of that length has a great amount of elasticity in it?

A No, I wouldn't say that.

Q Well, what I'm asking you is this -- have you in the course of your supervision, or as an officer of the corporation, supplied help in reaving say a 500-foot long one-inch cable through the sheaves of a four-part block? Have you furnished help?

A Right. If there was extra labor around, as if in the case where we were in the yard, certainly we would supply it.

Q You would?

A Sure.

THE COURT: You said this is 500 feet. In doing the rigging you don't use more than the end of it, you don't use the 500 feet, you just use the end of it, enough to get the pulleys full, and then you lift it up --

THE WITNESS: We use the winch.

Q Would it be fair to say in changing over the block from two-part to four-part on the November 14, 1970, aht that would be a situation where help would be required?

B64 A No, definitely not. It would be fair to say that that was a changeover that took place on the job and that the normal crew of two men would be sufficient.

Q Well, isn't the engineer up in cab, isn't he holding the load?

A Holding the load, did you say?

Q Yes.

A When you say holding the load --

Q The block.

A When he's positioning the block?

Q Yes.

A Yes.

Q When you say you give help, what are the circumstances under which you provide help?

A Well, in our Port Newark yard we have longshoremen, various longshoremen that work for us, and I'm sure on many, many occasions if someone was changing a block that another man would come over and lend a hand.

Q And give him a hand?

A Right. On his own.

Q And that would be true even if two men came over?

A Sure. Definitely.

Q And you have never had any objection to that?

A No.

Q As a matter of fact, that helps the company go ahead with its mission to load the vessel?

A Correct.

Q And it stops the delay of the gangs of longshorement standing idly by?

A Yes.

Q Is that right?

A That would be correct.

Q And in this case testimony was offered that there were four longshoremen on top of a 25-ton container ready to put the hooks on each corner when it was discovered by Mr. McSweeney that the two-part block couldn't lift that container. Do you follow me on that?

A I'm following, yes.

Q Now, those four men, they were standing idle until the two-part block was changed over to the four-part block; isn't that so?

MR. BROWNE: Objection, your Honor.

THE COURT: Yes, sustained.

Q Would those four men on the container help changing the blocks?

THE COURT: He wasn't there, Mr. Corcoran.

MR.CORCORAN: I'm asking him from his experience like your Honor asked him.

THE COURT: I know, but you are talking about November 14th, four unidentified men, and he wasn't there.

MR. CORCORAN: Well, he answered the same questions to your Honors questions, he wasn't there.

Q Mr. Rudolph, did you ever observe longshoremen at a pier that were not in the employ of Rudolph helping the changing of a block?

A Yes.

Q And did you at time on behalf of the Rudolph Company make arrangements for longshoremen that were not part of the employ of the Rudolph Company change blocks?

A I can't say that specifically I did, but I would think in a matter of conversation --

THE COURT: Now, is this speculation on your part?

THE WITNESS: Specifically, I can't remember making arrangements, but I think I must be fair and say that it could happen.

Q In other words, the Rudolph Company has in the past made arrangements for longshoremen not in its employ to help the crew, or help Mr. McSweeney, or the oiler change the block?

A Not really arrangements. I couldn't agree to making an arrangement of any sort, but I would be certainly very happy if that came about just to help my men, and of course expedite the situation.

Q And you have seen that happen?

A And I have seen it happen, yes, sir.

Q Where the men were not part of the employ of the Rudolph Company?

A That's correct.

Q When the pier superintendent orders the oiler on the R-5 to change the block over, would you say that that order is a follow-up of his responsibility and duties to load the Yamawaka at the time?

MR. BROWNE: I object, your Honor.

THE COURT: Sus;atined.

Q In furtherance of that mission? Do you understand my question, Mr. Rudolph?

A No.

MR. BROWNE: The objection was sustained.

MR. CORCORAN: I will withdraw it and reword it, if I may.

Q Would you say that the prime duty, or objective of the ITO acting through its pier superintendent was to load the Yamashita Lines, the YAMAWAKA MARU in as prompt a period of time as it could?

MR. BROWNE: Objection, your Honor.

THE COURT: Sustained.

Q Would you say, Mr. Rudolph, from your experience along the waterfront that it is the sole duty of the ITO, known as the contractor, to load the vessel?

MR. BROWNE: Objection, your Honor.

THE COURT: Is there any dispute that the stevedores are there to load the vessel?

MR. CORCORAN: Well, I'm asking that because then I'm laying a foundation for my next question.

MR. BROWNE: They have other duties, I think. When they are terminal operators I know they have other duties.

Q Put it this way: Among the duties of the ITO, International Terminal Operating Company, and particularly on the morning of November 14,1970, at Pier 6, was among the duties that the ITO had was to load the YAMAWAKA MARU?

A Yes.

Q And during any lull in the loading operation caused, say, by the necessity of changing from the two to four-part block to that extent the loading operation was deferred, or stopped while they waited for the two-part block to be changed over?

A As far as the R-5 was concerned, yes.

THE COURT: Mr. Corcoran, what is the purpose of this line of questions?

MR. CORCORAN: I'm going to ask him the question.

THE COURT: But what is the purpose of this whole line?

MR. CORCORAN: Well, to show that the ITO superintendent in furtherance of his objective, or goal, or mission to load the Japanese vessel would assist in the changeover as part of his overall duty.

THE COURT: Go ahead.

MR. CORCORAN: All right, sir.

THE COURT: Go ahead.

Q Did you hear this dialogue I had with the judge?

A I did.

Q Now, the question I am putting to you, Mr. Rudolph, in answer to your question in which you stated that it would be the objective among the duties of ITO is to load the Japanese vessel, and during the period that the changeover was taking place between the two to the four, to your knowledge has the pier superintendent assisted, either directly or through his men, in helping the changeover to bring about the completion of this changeover to get on with the loading by the R-5.

MR. BROWNE: Your Honor, I think he has already answered the question.

A I'm a little confused on the question.

THE COURT: Yes, I am too.

Q Well, what we tried to establish first, Mr. Rudolph, is that one of the prime purposes, or objectives of the ITO is to load the Japanese vessel. You don't find any fault with that?

A No, I'm just trying to understand your question.

Q Now, during the lull, or the stoppage caused by the changeover from the two to the four-part block, insofar as the R-5 was concerned, it was not loading the Japanese vessel?

A That's correct.

Q That is correct; isn't that so?

A Yes.

Q Now, inasmuch as the ITO and the pier superintendent, their responsibility or duties or objectives were to load that Japanese vessel, did they not assist either directly by the pier superintendent or some men that he ordered to help the members of the R-5 to help in the changeover?

A I don't know.

Q But have you seen that happen in the past?

A I have seen it happen in the past.

Q Do you know how many hours, if any, the R-5 worked on November 13, 1970, the day prior to this occurrence.

A I don't know.

Q Would you tell us, please, why the change of block from two to four-part was not done on November 13, the day before this occurrence?

A I don't know why it wasn't.

Q I think you have told us that no one from the Rudolph Company had visited Pier 6 or the farm area to see the actual weights or containers that were to be loaded?

A I didn't recall anybody visiting the farm.

Q You yourself didn't visit?

A I don't recall it, no.

Q Do you know, Mr. Rudolph, if Mr. McSweeney was a member of that crew the day before, or was he on another vessel?

A I believe from the log that I have inspected that Mr. McSweeney was on another vessel.

Q That was the R-6?

A I believe so, yes.

B65 Q Where was the R-6, 21st Street?

A That's correct.

Q Is that an ITO pier?

A That's correct.

Q Do you know, Mr.Rudolph, that they changed the block on the R-6 from a two to a five-part block? Do you know that?

THE COURT: What difference does that make, Mr. Corcoran?

MR. CORCORAN: Because my next question is, did the ITO help in the changeover.

A I don't know.

MR. CORCORAN: No further questions, your Honor.

THE COURT: Is there any redirect?

MR. BROWNE: Yes, your Honor. Just one point.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. BROWNE:

Q You were asked about people in your yard giving help, and sometimes the stevedore giving help. What was the help that was usually given by these third parties that you were talking about? What did they help to do?

A Well, they would really assist on any type of work that might be done as far as a changeover, or whatnot. Just really lending a hand in a company spirit, I would say.

Q Can you be more specific as to what type of help it would be?

A On what specific task?

Q That's my question to you.

MR. CORCORAN: I submit he has already answered this.

THE COURT: No, overruled.

Q What tasks would they give help in? How long did it take to change a block?

A Takes about an hour, I would say. This is what we generally figure.

Q How much of that time is involved in lifting the block of the deck of the ship and putting it on the dock where you can work on it?

A About a minute.

Q Then what is done?

A Well, in this particular case, going from a two-part of a four-part, the cable is either taken off the drum and a longer cable put on, or if the longer cable is on the drum initially, then it's just a matter of re-reaving the various sheaves.

Q When you have seen third parties give help, be it stevedores or your own help, referring to the questions between yourself and Mr. Corcoran in the last 20 minutes, were you referring to this reaving, or were you referring to the raising and the lowering of the block?

A Basically I was referring to the reaving, because this is where the majority of the work is.

MR. BROWNE: Thank you. I have nothing further, your Honor.

THE COURT: Thank you very much, sir.

RECROSS-EXAMINATION

BY MR. CORCORAN:

Q Mr. Rudolph, would you say that the landing of the block, the four-part block, is part of the job of changing it over?

A Yes.

Q Do you have any idea of the weight of the four-part block?

A I would say anywhere from between 1000, 1500, 2000 pounds

MR. CORCORAN: Thank you very much.

(Witness excused.)

MR. BROWNE: Plaintiff rests, your Honor.

THE COURT: All right. Defendant Rudolph having rested, do you have any rebuttal testimony?

MR. CORCORAN: No, your Honor.

THE COURT: All right, then you rest your case.

MR. CORCORAN: Yes, your Honor.

THE COURT: All right.

Ladies and gentlemen, you are excused until 10:00 in the morning, at which time we will begin the summations of counsel, after which I will charge you on the law and you will retire and consider your verdict.

I will see you tomorrow morning at 10:00.

(Jury leaves.)

THE COURT: Mr. Browne, I assume you renew your motions based on the entire case.

MR. BROWNE: Yes, your Honor, and I move for a directed verdict. The evidence now is uncontroverted that the complement of men that we provided was the complement provided by the union, it is a complement that was provided for years before and for years since, and it was adequate to do this particular job of landing the block.

I think that's pretty much what has been added to it. But I thought it was crystal clear there is no proof of causal relationship here. No evidence whatever. By relationship, I mean a tag-line, another person or two or three, whatever the testimoney may be, they could have or would have been likely to stop whatever Mr. McSweeney says happened.

THE COURT: I will reserve decision on that motion. I think you should be prepared to sum up. I will see you at 10:00 in the morning.

(Adjourned to March 23, 1976 at 10:00 a.m.)

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Michael McSweeney,

-vs- 72 Civ. 1782

M.J. Rudolph, et al.

New York, New York
March 23, 1976--10:00 a.m.

B1

(In open court - jury not present)

THE COURT: Mr. Browne, I understand you have an application or two?

MR. BROWNE: Yes, your Honor. Two, your Honor.

Your Honor, in going over the pleadings this morning in preparation of the summation, I noted that it appears that we inadvertently forgot to put in our pleadings the contention of contributory negligence. It was in the other parties' pleadings, and I would call your Honor's attention to the proposed pretrial order which was signed by Corcoran & Brady, but apparently never reached fruition, and on page 12 of it, your Honor, they acknowledged that our contention, that that contention at line 4, the plaintiff's injuries, if any, were caused by his own negligence.

So I think contributory negligence is in the case.

THE COURT: Yes, I had assumed that it was.

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MR. BROWNE: I had too, your Honor, until this morning. So I would respectfully move to amend the pleadings.

THE COURT: Well, that motion is granted, unless I hear strong opposition to that. Mr. Corcoran, do I hear any strong opposition to that?

MR. CORCORAN: Does your Honor have a copy of the pretrial order?

THE COURT: I do. I just looked at it.

MR. CORCORAN: Does it say that?

THE COURT: It does say that.

MR. CORCORAN: All right.

MR. BROWNE: Your Honor, secondly, the records of Rudolph Corporation --

THE COURT: In that connection, Mr. Browne, let me ask you in terms of charging this, trying to get a feel of what everybody's position as so I could fairly state it to the jury, you are sort of straddling the fence here. You are saying we do not contend that the tag-line was needed or customary, we do not contend that this was a two-man job, but if you find that it was, then the plaintiff was contributorily negligent in going forward with it without either more help or a tag-line.

MR. BROWNE: Or turning around to Joe, the harbor master, or something like that.

THE COURT: I understand that.

MR. BROWNE: Your Honor, the records of Rudolph Corporation indicate that $840 was paid as maintenance. I don't think it is appropriate to put that before the jury, but I would ask the Court in the event of a judgment to offset that amount from any judgment because the plaintiff has proven lost earnings, and no doubt will rely on lost wages as part of his damages.

THE COURT: All right. Mr. Corcoran, I will probably hear it in your summation, but in terms of putting it in my charge, what are the lost wages that the plaintiff--

MR. CORCORAN: $7,500.

THE COURT: $7,500. All right, would you bring the jury in? Before you do that, I have not heard from any doctor or anywhere else that there is a claimed permanent injury here.

MR. BROWNE: There is no such testimony, your Honor.

THE COURT: I didn't hear any, so I'm not charging a permanent claim. Because no doctor was asked whether this condition was permanent, and gave any opinion on it.

Am I right about that?

MR. CORCORAN: In response to that, your Honor,

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the plaintiff testified that he continues to suffer from these complaints.

THE COURT: Well, I'm going to charge the jury that they may find to this day, but it seems to me that this is a question on which the plaintiff is not competent to testify as to the future, and the jury would be speculating.

MR. CORCORAN: Then in that case, your Honor, I respectfully request your Honor to charge the jury that the defendants had two doctors examine this plaintiff and their failure to appear, they can conclude that these doctors if they testified would have concurred in the findings of Mr. McSweeney's doctor.

In other words, the failure to appear in court after they had been called upon by the defendants to examine the plaintiff, that their failure to appear and contradict the claim for injuries --

THE COURT: It is a little bit late for asking that charge, isn't it?

MR. CORCORAN: No, your Honor. I asked that inside in the robing room two days ago, and it was taken down by the reporter. In fact, I gave you the names of the doctors. Dr. Muldava and Dr. Balanzweig, and I gave you the dates.

THE COURT: I know, but you never gave me any charge, any proposed charge on that so I could consider your charge.

MR. CORCORAN: Well, at that time, your Honor, you stated you wouldn't consider it, and I protested that and objected to it. I gave you the date, the time, the place of each of these doctors. Dr. Balanzweig and Dr.Muldava

THE COURT: It seems to me that was in another context. But, in any event --

MR. CORCORAN: I certainly gave it to you for that purpose.

THE COURT: I will give consideration to it. You had better write out in longhand what it is you want me to give so I have a starting point in frame of reference. Don't do it now, there is a summation coming up. After the summation you can write it out, and during the recess give it to me.

MR. BROWNE: If the Court is going to consider that, may I submit the reports of Dr. Muldava and Dr. Balanzweig? Dr. Balanzweig said, in essence, whether the case is a disc or not is a question for a neurologist. Dr. Muldava is a neurologist, he said it wasn't. Dr. Muldava has had a heart attack and he asked me if I could please not bring him down here.

I am not contesting any testimony that went in, but those reports are there which indicate that there is no such thing.

MR. CORCORAN: Of course I move to have stricken from the record all comments of counsel. Number one, it's not sworn testimony. Number two --

THE COURT: I will mark these as Court's exhibits for identification.

MR. CORCORAN: These exhibits could never be offered in evidence.

THE COURT: Now I am troubled in thinking further about what you are saying, because it is perfectly clear that Dr. List contradicted Dr. Cook.

MR. CORCORAN: No.

THE COURT: Dr. List did not backup Dr. Cook, if I understand.

MR. CORCORAN: I submit, your Honor, that that's not the issue. The issue is --

THE COURT: I know, but you didn't call Dr. List. Now do I have to include Dr. List in that litany of doctors?

MR. CORCORAN: No, sir. No, he is not. Because, number one, he didn't testify here, there was no opportunity of cross-examination.

THE COURT: No, what I mean you are saying, I should have the jury draw inferences from doctors that were

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not called, and you did not call the doctor.

MR. CORCORAN: Oh, yes, that's a different state of facts. That's on the other side. We are familiar with that rule, your Honor, where the failure of a person to call a witness under his control --

THE COURT: I know, all I'm saying is if you want me to say the doctors didn't come, you have got to say one of your doctors didn't come.

MR. CORCORAN: No, no. He had an opportunity to subpoena him. This was not my witness. This was not my doctor.

THE COURT: Let's put Dr. List --

MR. BROWNE: Dr. List's report has already been marked for identification. Dr. List does not support Dr. Cook.

THE COURT: I remember looking at it.

MR. CORCORAN: I move that all be stricken as not --

THE COURT: I'm not the trier of the fact, Mr. Corcoran. What are you getting so upset about?

MR.CORCORAN: I'm sorry.

THE COURT: Now, you write up for me when you have finished your summation, you write up for me the nature of the charge you would like me to give in that regard and later I will see whether I am moved to give it. And whether Dr. List doesn't have to be included in it. Because he has an omitted doctor as well.

MR. CORCORAN: Well, if your Honor please, in my summation I will make reference to the examinations by Dr. Muldava, Dr. Balanzweig of the plaintiff. That's in the record. On the particular dates.

MR. BROWNE: It's not in the record, your Honor.

B2 MR. CORCORAN: It certainly is. That record is not in the --

THE COURT: No, I don't know that there is any testimony that he was examined. Did the plaintiff testify thathe was examined by a doctor? Because if he did not testify to it, then the record does not permit you to make that argument.

MR. CORCORAN: Oh! On the contrary, your Honor. When we were in the robing room --

THE COURT: No, he has got to have testified to it.

MR. MC SWEENEY: Would I be out of turn --

THE COURT: No at all.

MR. MC SWEENEY: Your Honor, Mr. Corcoran attempted to ask me when I was on the witness stand if I was examined by any other doctors, and there was an objection and you sustained the objection.

MR. CORCORAN: In fact, I used the name of the doctor. I even said, on such-and-such a date were you examined by, and I don't know whether it was Dr. Muldava or Dr. Balanzweig, but you objected to it, and I never got to the second doctor. But in the robing room it was definite as to date, place and time when Mr. McSweeney was examined by these two physicians.

THE COURT: All right, you draw up what you want in the way of a charge and I will give it consideration.

MR. CORCORAN: All right. Then in the summation I am going to make reference to that, to the fact that he was examined by these two physicians.

MR. BROWNE: Your Honor, the only doctor is Dr. Muldava. I spoke to him on Thursday, or Wednesday, and he asked if he could please not come, he has had a heart attack, and I know that the man has been ill and I haven't used him to testify in over a year because of his condition. I would ask that your Honor consider the reports and if it is fair -- if I have hidden something, then the jury should know about it. And if there is anything that the jury should know about I would ask the Court to tell them.

THE COURT: Let me see these reports. Mark them Court's Exhibits 1 and 2 for Identification.

xx (Court's Exhibits 1 and 2 marked for Identification.)

THE COURT: Now, Dr. Muldava doesn't essentially disagree with anything Dr. Cook says, which as he finds no neurological impairment at all. That is really all he says.

MR. BROWNE: That's right, Judge.

THE COURT: Then he recites the plaintiff's statement of his pains.

MR. BROWNE: Yes, Judge. Judge, I mean, I think that this instruction and these arguments should be used in a way that is fair. This man hasn't seen a doctor since August of 1971. He's put on all of his testimony. The reaso I didn't put on Dr. Muldava was because of what I said, I didn't put on Dr. Balanzweig, he recommended neurological consultation. I think any argument on this point is nothing but a smoke screen. They are trying to make it seems like we are hiding something, and I'm not hiding anything.

I don't have the reports go before the jury. I don't care what happens to them. But to try to turn them into something they are not, that's wrong.

THE COURT: Let me ask you this: Is there any reason that plaintiff couldn't have subpoenaed these doctors if you wanted these reports in evidence?

MR. BROWNE: I think they could have offered the reports in evidence, your Honor. There is case law in the Court of Appeals on that, that my reports can be put in evidence. Since we got the reports they are admissible at the plaintiff's request.

MR. CORCORAN: In my humble opinion the admission of any documents not properly offered for admission into evidence permitting counsel the opportunity of cross-examination would warrant a mistrial.

THE COURT: No, he is saying that if you had felt that these were of assistance to you, and you claim that they are --

MR. CORCORAN: You mean the reports of Dr. Muldav We claim no such thing.

THE COURT: Well, you claim that they do not contradict your case.

MR. CORCORAN: What I'm saying is this, your Honor --

THE COURT: You want me to tell the jury that they do not contradict your case.

MR. CORCORAN: No. What I'm requesting is that the failure of the defendant to call doctors who examined the plaintiff and who are under the control of the defendant, an inference can be drawn that their testimony would not be inconsistent --

THE COURT: Would not be inconsistent?

MR. CORCORAN: Would not be inconsistent with the testimony of Dr. Cook or Dr. Gudelisdo.

THE COURT: All right, I am going to take a recess.

(Recess)

(In open court - jury not present.)

THE COURT: I am not going to charge any inferences. First I want to observe that the Balanzweig report is essentially a recitation of what people told him and in effect says that until a neurological -- he can tell nothing without a neurological examination which was not made, so I do not find that that adds, detracts or anything else from this picture. Therefore, to have the jury speculate on what might have been contained in it, I think, is improper.

Next the Muldava one is essentially neutral. Finally, and even more important, the law is clear that if I charge an inference one way, I ought to charge an inference the other way. Therefore I would have to charge an inference against the plaintiff that the failure to call Dr. List would permit them to draw adverse inferences to what his view would have been of the plaintiff's condition. And in examining Dr. List's report it would seem that that was in fact so, and that Dr. List makes a statement at page 2, and

Dr. List examined this man for purposes of treatment which gives even more weight in my judgment to what Dr. List is finding.

He examines him for purposes of treatment and for consultation with Dr. Cook and says, "I was impressed that the man moved remarkably freely for somebody claiming enough pain to be in the hospital."

And his final conclusion, "My impression that the patient had a muscle sprain at the time of his injury" and it says nothing about the herniated disc possibility. Then he goes on, "His complaints far outweighed any of the objective signs when I examined him two months after his injury, all of which is certainly a recording of skepticism on the plaintiff's complaints."

Now, obviously it would be unfair to permit the jury to speculate as to what the doctors for the defendant had said and not have before them the ability to speculate on what Dr. List had said. I find in McCormack's Treatise on Evidence in the second edition, August of 1972, the rule stated at Sections 272 having to do with failure to call witnesses, the following: "Despite the plentitude of cases supporting the inference ,caution in allowing it is suggested with increasing frequency .This counsel of caution is reinforc by several factors . Possible conjecture or ambiguity of invites waste of time in calling unnecessary witnesses or in presenting evidence to explain why they were not called, anticipating that the inference may be invoked entails substantial possibilities of surprise."

Then finally, "The availability of modern discovery procedures serves to diminish both the justification and the need for the inference."

Then a lot of cases are cited in footnotes 33 and 34 on page 657.

On the basis of those, I conclude that it would be unfair and improper to charge the inference that the plaintiff has requested.

Now, Mr. Corcoran, since I am not going to charge it, obviously you are not to argue it to the jury.

MR. CORCORAN: But I am going to ask Your Honour's permission for me to make a statement for the record

THE COURT: You may.

MR. CORCORAN: At the commencement The Court's review of letters sent by Dr. Balanzweig and by Dr. Muldava to the attorneys for the defendant Rudolph is highly irregular and improper. Neiwhter of these letters are in evidence. By reading the contents of them The Court is substituting its judgment for that of the jury.

There is no opportunity to cross-examine these doctors, Balanzweig and Muldava, and by reason thereof these letters would definitely be inadmissible. Reference to McCormack's Treatise on Evidence does not change the rule of law as I understand it that the failure of a party to call a witness under its control may permit the jury to draw an inference that if such witness were called he would not give testimony inconsistent with the findings of the witness sought to be contradicted.

In that regard and for the record, I am requesting the Court to charge the jury, I respectfully request the Court to charge the jury that the failure of the defendant Rudolph to call Dr. Howard Balanzweig and Dr. Joseph Muldava, each having an office in the Borough of Manhattan, City of New York, who examined the plaintiff following his accident of November 14, 1970, will permit the jury to infer that their testimony, if given, would not be inconsistent with the findings of Dr. Cook and Dr. Gudelisdo.

I so request.

THE COURT: The request is denied. All right, would you get the jury in.

(Jury enters the courtroom.)

THE COURT: Good morning, ladies and gentlemen. Sorry for the delay.

All right, Mr. Browne, go ahead.

MR. BROWNE: Your Honor, Mr. Corcoran, Madam Foreman, ladies and gentlemen.

The rules provide now that I am entitled to speak to you, to discuss with you the evidence as I see it. The rules then provide that Mr. Corcoran will do the same thing and that will be the end of it, and neither of us will speak to you again. Therefore, I am going to go into quite a bit, but because I go into it, discuss some things, doesn't necessarily mean, I ask you not to draw any conclusions that you necessarily will consider all of the issues that I am going to discuss now.

This case has been simplified quite a bit since we started. The only issues left in the case are whether the floating crane, the R-5, was unseaworthy. Whether that unseaworthiness, if there was any, caused the damages complained of. Whether Mr. McSweeney's own negligence caused the damages complained of. And, finally, what are the damages complained of.

If you find there was no unseaworthiness, then I think that the Court will charge you that your job is over.

MR. CORCORAN: I object and I don't wish to object during counsel's summation, but I think it is improper to tell the jury what the Court is going to charge them. That's up to the Court to charge, not what Mr. Browne says he is going to charge.

THE COURT: Let me hear the last three or four sentences, please.

(Record read.)

MR. BROWNE: May I go on?

THE COURT: Yes.

MR. BROWNE: If you do find there was unseaworthiness, then you will go to the issue of whether the unseaworthiness was causally related to the damages. Only if you find both of those elements will you go to the question of contributory negligence.

MR. CORCORAN: If your Honor please, I object to counsel telling them what the law is.

THE COURT: It is a perfectly logical statement of how he thinks they have got to proceed in considering this matter.

Would you read it back again so the jury can hear it without interruption, then you may continue from the point you have left off.

(Record read.)

MR. BROWNE: Let me start with, if I may, unseaworthiness.

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I am here to say that there is no evidence that there was anything wrong with the R-5. Let me try to anticipate what claims may be made and discuss with you the evidenc as to those claims.

There was evidence by Mr. McSweeney that there was no tag-line aboard the R-5. For that matter, in the vicinity of the R-5 on the pier.

Let me take the issues one at a time. I am not talking now about whether a tag-line was needed, but was there a tag-line. Mr. McSweeney said no. But you know that we have depositions before trial, we had this deposition quite some time ago and I interrogated Mr. McSweeney on an answer that he gave to me.

I said, back in 1972, with the same cast of characters that was here now, was here then, "You didn't put a line on it at this time? Not in this particular case. Why not? Because this guy Chuck was hollering and screaming and ranting and raving and I was rushing. And when you are not rushing you put a line on it? Yes. How long does it take to put a line on it? Well, you have to, you know, go -- it's under the deck -- get a line, you know, put it on."

Now, on the stand Mr. McSweeney said, well, the word "under the deck" it was a mistake by the reporter. And it's true that reporters do make mistakes because there was some deposition of the doctor that I read. But in this particular deposition, the original of which I think is in the possession of the Court of Mr. McSweeney, it was signed by Mr. McSweeney. On the stand he acknowledge that the notary public who took his signature under oath was his attorney, Mr. Corcoran.

So you are asked to believe that this typographical error on what appears to be a crucial issue in the case went undetected by Mr. McSweeney and by Mr. Corcoran and that he meant to say, "Well, you go onto the deck."

Well, if that were true though, it seems somewhat unlikely to me. I don't think the sentence has any meaning. Because we know that Mr. McSweeney was on the deck when he hooked up the four-part block of the rigging. So it's not clear what he meant to say to me if the word "under" should be spelled "onto" because how would he go onto the deck.

Now, what is the testimony that there was no tag-line? It wasn't Mr. McSweeney's testimony that when the job came ready to be done he went and he looked for a tag-line to see if there was a tag-line. No, he came out in the morning about 7:30 and he inspected. It's a large barge, I think they told you it was something like 30 feet wide and 100 feet long, I forget. But it is big. It had a house full of equipment. A cabin.

He wasn't looking for a tag-line, he was looking for a grease gun, whatever equipment he needed to get on with his job, which as an oiler.

But it is his testmony that at that time while he was doing something else, while he was looking for grease guns, he was able to form a conclusion that enabled him to testify here yesterday, or Friday, that there was no tag-line anywhere aboard that boat.

What is a tag-line? A tag-line is not a special line. A tag-line is just a piece of rope. All he was talking about, and the whole complaint here is that there wasn't a piece of rope. You can figure it out for yourselves. I would imagine 10 feet would be ample.

It is his testimony that there was no piece of rope aboard the R-5, and he knows that because he didn't see one while he was looking for the grease guns. Think to yourself, if you would, you go looking for something, you know, you go into the closet and you are looking for oatmeal, you don't get your oatmeal, you are not particularly familiar with that closet, you weren't there the day before, it's not in your own home, and in I come and say, is there any sugar in the closet? Could you reliably answer that question? Or is that testimony that was shaped after the depostion in 1972?

B4

Let's go on to the need for a tag-line, if we may, because it's really not important that there was one or not if he didn't need a tag-line. My understanding and my recollection of the testimony which is not binding on you, I'm just talking, your recollection of the testimony is what counts, my recollection of the testimony is Mr. McSweeney said you need a tag-line unless you have somebody to help you. If you have one or two other people to help you, you don't need a tag-line.

That was, I believe, his position. One or two. It was his testimony, as I understood it, and it's not my understanding, it's your understanding that counts, it was his testimony that when he was on the ship, on the barge, he understood that he had assistance from Joe, the harbor master, and Joe, the harbor master, was a little cynical and said that he would help. So it would seem to me that even under Mr. McSweeney's testimony there was no particular need for a tag-line because he had Joe, the harbor master, to help him. At least he thought he did.

So it's not likely that he ever gave any consideration to putting a tag-line on.

Now, on the issue of whether you need a tag-line or not, you have a couple of other points to consider here.

Consider Mr. Rudolph's testimony. Mr. Rudolph, like Mr. McSweeney, is, you know, interested in the outcome of this case. You have to take that into consideration. But Rudolph said, we don't use a tag-line. We don't need a tag-line. All you need is one man to guide the block.

Remember, you are not lifting the block. You're not pushing the block. You're just guiding it to make sure it comes down, I think the testimony, Mr. McSweeney's testimony was you have toguide it to make sure it comes down parallel to the other block so that you can reave through.

This is the minor part of the job. The real hard job we haven't even gotten to yet, which is reaving thes cables. And that never comes into the case. So I think the tag-line is an issue made up. I think it's forced. I don't think that's a legitimate indicia that there was something wrong with the R-5, that the R-5 was inadequately fitted for its tasks, or its function.

I imagine that the second contention of unseaworthiness would be that the R-5 was not properly manned. That there weren't enough people doing the job, and that's why Mr. McSweeney got hurt. You have heard the testimony from Mr. Rudolph which is uncontradicted that the crews of these floating cranes are established by union agreement. A union to which Mr. McSweeney belongs. That they have always been two men crews. Even on the R-12 which has a greater lifting capacity. It has a greater lifting capacity.

You have heard no expert testimony, any kind of testimony that Rudolph should have sent out more than two people on this particular job.

So I think that the evidence is that the vessel was properly manned. It had the same two people that it always had.

Then they will contend, well, the vessel was rendered unseawothy by the fact that they would usually get help, and we didn't get help. Well, they never asked Rudolph for help. In fact, there is a serious question in my mind whether they were refused help. You remember the testimony. Joe, the harbor master, said he would help. McSweeney went aboard, arranged to have it brought over the pier, he reached the point that the pier was stationary, McSweeney said he never saw it going up, he didn't see it until it landed.

Be that as it may, you evaluate that testimony. It did reach a point unequivocally where the thing was hanging in the air some five feet, I guess, and where nobody in the employ of Rudolph, or nobody at all for that matter, except McSweeney, was moving it.

The testimony is crystal clear that the crane operator was no longer employed by Rudolph, was not moving the crane. He wasn't raising it, wasn't lowering it, and wasn't rotating it.

Mr. McSweeney says, well, it was rotating, if you let it rotate one way it would rotate back. And in back of Mr. McSweeney, as far as he knew, was Joe, the harbor master. He never asked Joe, the harbor master, to help him at this point. He had previously asked him, at least the help had been offered, be it asked for or not, but at this point there was no refusal by Joe, the harbor master, to help.

He probably just didn't know what he was supposed to do. He was waiting for McSweeney to say, now, come around and grab it this wasy and we'll do whatever we have to do. No indication McSweeney asked him for assistance at this time. No indication that he refused assistance.

So if you should conclude that more than one person was needed for this job, I sincerely challenge you to tell me why McSweeney didn't ask. And I think in all sincerity, I think that Joe, the harbor master, was probably there ready to help.

Now, again we have a conflict. Rudolph said that we don't need two people any more than you need a tag-line. It's not a lifting, it's not a pushing, it's not a pulling. It's simply a guiding. To be done slowly.

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So where was the need for help? So then what happened? Well, that's interesting, too. Because when we get past the issues of unseaworthiness we come to the issue of causality. Was there some connection between the claims that are made and the injuries that are claimed?

McSweeney testifies here that it lurched and twisted. Now, he was asked a long time ago what happened, what caused his injury. He gave a three-page statement which he signed and which is in evidence which he initialed from place to place which he corrected in two places and which he signed. This was before the litigation started.

He says, I was rigging the lower block and while pulling on the block, lower block, I was attempting to land the lower block in the correct position. We were going to change the block from a single part to a four-part block. While pulling the block, I felt my back give way and I fell to the dock.

The whole statement is available for your perusal. That's pretty much the only parts of it that have to do with the accident. The other parts have to do with what happened after the accident, the hospital, and so forth.

So we have Mr. McSweeney's statement in which he -- he admits that there was no, or that he didn't tell the individual who took this statement about the lurching

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and twisting.

For that matter, we have [illegible]. Rudolph's testimony to the same effect. Mr. Rudolph saw him that afternoon, Mr. Rudolph drove him to New Jersey. If there was no lurching and twisting, which I ask you to find, what was the connection between the injury and the claims? Would it have made any difference if he was pulling on something that somebody else was pulling on when his back gave out? Would it have made any difference if he was pulling a tag-line and the back just gave out?

I asked Dr. Cook, the orthopedist, I think I read it, and I think I asked Dr. Gudelisdo about it. Dr. Gudelisdo and I had a difference over what you mean by the word accident, but when we finished, I think Dr.Gudelisdo pretty much agreed with Dr. Cook, if you exchange the meaning of the word "accident."

Do you get disc problems without accidents, Doctor? Yes. Is it true then that a normal healthy person can have a disc problem even though you find no abnormality and even though he had no accident? Is that possible? Yes, sir, it is possible. Is it a rarity, would you say as disc cases go? No, it's not rare.

I think I asked Dr. Gudelisdo while I was picking up my briefcase wrong, if it was empty could I sprain my -- get a disc. He said, yes. So the medical evidence is in harmony with Mr. McSweeney's statement of a few days after the accident. You can have a back injury just moving this thing around.

B5

What difference would it have made if Joe, the harbor master, who was not an employee of Rudolph, if Joe, the harbor master, was hanging on to the other side of this block? Even if it lurched, the block weighed over a thousand odd pounds and it was hooked up to another block that weighed about 500 pounds, and its cables, so you are dealing with a pretty heavy pendulum here, if we can call it that. This thing has mass. If it moved wouldn't it have moved just as much if Joe, the harbor master, has been holding on to it?

I don't know, I think it would, and I guess McSweeney thinks it wouldn't. I tried to ask Mr. McSweeney these questions, you remember my last few questions with Mr. McSweeney about these things, how do these things like this that weigh 1500 pounds act. And Mr. Corcoran said Mr. McSweeney is not an expert, I object. And I took that, I agreed with that, he is not an expert. There hasn't been any expert to testify here. No one came here to tell you how this happened. No one told you how Joe, the harbor master, who was hanging on for dear life could have changed it. The lurching, the lurching and the twisting that we don't find in the statement. And which is pretty crucial to the case, I guess.

What made it lurch? Speculation by Mr. McSweeney that maybe the line was twisted. Well, Mr. McSweeney had loaded it on and lifted it up, and then I think this is kind of important, I have misunderstood what happened, it wasn't let down by the drums, it was lifted up way high, swiveled over and the boom was lowered. So you didn't have that much length of cable. And you didn't have cable that had been reeled out a few seconds before. You only had a relatively short cable because the blocks had been lowered by the lowering of the boom.

The reason they had lowered the boom was that they were going to be reaving, you know, to the pulley on top, too, so they had to have the boom lowered. So where is the evidence of what caused this lurch? It's clear that Monsinger didn't cause it, the crane operator. On that Mr. McSweeney was clear. Whatever caused it there is no clear evidence. Perhaps there was a swell in the water. Speculation. That's all Mr. McSweeney offered you.

Maybe the reason he doesn't know what caused it is because it was created sometime after the making of this statement. So I say that there is no evidence at all here to connect up the claims, and the claims I think are doubtful.

with the injuries that are claimed. And I think that evidence is pretty much essential.

You are exposed to a man who I'm sure did sprain his back. That's your problem. But that's not enough. That's not a case. You have got to show that the sprain in the back, he has to show you that the sprain in the back was caused by something that was wrong with the Rudolph crane

I don't know of any other claims of unseaworthiness. There is some sort of an overlying concept here, idea here that perhaps we should have changed the thing the day before. It was raining the day before in the afternoon. And we don't know why it wasn't changed, there's no evidence why it wasn't changed or when it should have been changed.

I think it was more likely if someone is going to slip and fall they will slip and fall in the rain. And I think it's more sensible to do the changing in the morning. On a nice morning.

Mr. McSweeney testified he was being rushed by Joe, the harbor master. Well, we didn't rush him. And he was afraid Mr. Rudolph would fire him. He was afraid that Joe, the harbor master, would -- McSweeney had been working for Rudolph many years and had never been fired. Still working for Rudolph. McSweeney never requested anything of Rudolph. Never let Rudolph know there was a problem. Never let Rudolph know.

Now, I am required to go to the injuries too because I will not pass this way again. I am required to comment to some extent as to what I think the damages should be. The damages are your province. I am permitted to comment on them.

McSweeney was out of work for possibly sixteen weeks, and he testified that he lost $7,500. We do not dispute that, so you can assume that he, for your purposes, was out of work, you know, that he lost the $7,500 in wages while he was out that time. If you get to damages, why, that would be an element of damages.

Then there will be talk about pain and suffering. Permanence. Duration of the injuries. I don't think there will be any talk about permanence, but duration.

Well, the evidence is that he went back to work, had a job that he worked for a month, light work around the yard. Then he went to work as a crane operator which was the senior position of the two. Makes more money. At least he makes more money, it's not a senior position.

As a crane operator, every day he climbs 40 feet to a cabin and runs the crane and he earns more money than he did before. He last saw a doctor in August of 1971, which

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was about six months after his stay at Overlook Hospital.

May I have the record of Overlook Hospital, please?

If you get to the issues of damages, why the records of Overlook Hospital are in evidence. You can look at them. A lot of discussion as to what he had. You don't have to go very far. He has post taumatic LS, means lumbo sacral, I think, sprain and a possible herniated disc. And that's signed by Jerome Cook. Final diagnosis.

So all the testimony this way and that way and the other way, did he have a disc or didn't he have a disc, yes, I think he had a disc, possible. But it never came back, it never bothered him. At least he never went to medical attention after April of 1971. And you can peruse these reco[illegible]

Look at the note I read you of Dr. Cook, and here on January 25, 1971, which Dr. Cook said was in Dr. List's handwriting, Dr. Cook says he was a first-rate neurosurgeon, where he says he moves remarkably freely for someone complaining enough pain to be in the hospital.

So I ask you if you reach the issue of damages to take into consideration Dr. List's comment. Take into consideration the fact that the man has been gainfully employed, hasn't sought medical attention in, oh, five years.

Nearly five years.

There is one more issue that I say should be contributory negligence. You will be asked to determine if Mr. McSweeney's negligence contributed to his damages. Of course if you stop on one of the first two issues, you won't be asked to do that.

Mr. McSweeney is a big strong man and he works on the docks. He is not in an office or working in a church. He's on the docks. People on the docks talk harshly, I suppose. And Mr. McSweeney was employed by Rudolph and had been employed by Rudolph for a long time, and he knew his job and he knew that he had a good job and he was not likely to be fired. And he was in charge of how he did this job.

All right, Joe, the harbor master, can tell him, you have got to change the block, and I suppose he could yell at him, but how you change the block is in Mr. McSweeney jurisdiction. So do you put a tag-line on it or do you go and get a tag-line on Pier 6 in Brooklyn, there were not tag-lines you could get? That was Mr. McSweeney's judgment. When it comes over the thing, if you think you need help, do you call for help, do you turn around and ask Joe, the harbor master? That was in Mr. McSweeney's judgment. He didn't do any of that. He just went out and did it.

I don't think you are going to reach the issue, because I don't think there is any basis for liability here at all. But if you do, I just suggest to you that McSweeney was in charge. McSweeney decided how this should be done. And there was all sorts of things that Mr. McSweeney could have done, if it was necessary.

I don't think it was necessary, but if he says it was, well then, it was him that should have done it.

Thank you.

MR. CORCORAN: May it please your Honor, Madam Foreman, ladies and gentlemen of the jury.

It has been a long time since the sailing ship days, but I believe that the rules pertaining to maritime activities persist to the present day. I will, of course, defer to his Honor to instruct you on the law, and I will make no attempt to trespass on the Court's responsibilities.

Whenever a case is brought in court the person who is being sued is given the opportunity of admitting certain facts or denying certain facts, and then an issue is drawn. But we learned in law school that there is another plea called confession and avoidance. That's a legal term to mean alibi. And by that I mean is that the Rudolph Company comes into court and says, we had certain responsibilities. The plaintiff was injured, but it wasn't our fault. And the means by which they offer the alibi, or the confession and avoidance plea is by a misstatement of facts to begin with.

It doesn't behoove me to comment on the statements made by counsel, because he and I know, and the Court will so tell you, that it is not evidence. But as part of the confession and avoidance approach, statements like, well, a tag-line is not necessary, if it was it would be 10 feet long, would be ample. There is not a scintilla of evidence in the record about 10 feet being ample.

Let me tell you right here and now that statement is false on its face. Because the proof in this case was that the four-part block taken off the deck was hoisted up some 90 feet, and you would have to have a helicopter with a 9-foot, or 10-foot tag-line to hold on to that block. And this is what I have been listening to for the last 35 or 40 minutes.

He's permitted to do it because it is an attempt to divert your attention from the true facts in the case.

Another little example of this technique is he goes off in left field and says the union requires a two-man crew. That's not an issue in this case. The issue in this case was did the defendant Rudolph provide adequate help in the oepration of changing over a two-part block to a four-part block.

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In that regard that responsibility is just eased aside like a piece of cargo. But let me tell you, yesterday sitting in that witness chair Mr. Rudolph, young Mr. Rudolph, testified that he uses his own longshoremen at times to assist in the changeover of the block from two to four-part. He even went so far as to say that he has engaged longshoremen from other people, not his own, to assist in that operation.

So why are we confronted by way of argument with facts that are certainly contradictory to the proof that was offered, and certainly not consistent with a fairly described event.

Now, as part of this confession and avoidance technique they put Mr. Rudolph on the stand. And mind you, there is no proof that he was on the R-5 that morning, so he doesn't know what its condition was at all.

Another form of this technique is the rhetorical question, and that's the question that's asked and you don't give the answer, the questioner gives the answer. And by that means he seeks to divert again your recollection to the facts.

For instance, he makes reference to Joe, the harbor master. He says, well, he didn't ask Joe, the harbor master, to help him. He is not biting the bullet there.

He is not recalling for your recollection the true fact. And let's go behind this method. It's like picking up a fieldstone and finding a slug there. Well, look underneath the rock. And the fact of the matter is that the technique was to divert your attention from the responsibility and obligation of the Rudolph Company.

They say, well, gee, he didn't ask the harbor master, and since he didn't ask Joe, the harbor master, that's the rhetorical question, he didn't need it or he was remiss in his responsibility, Mr. McSweeney was, in asking for it.

He's trying to cover up the fact that in the first and primary instance it was the duty of Rudolph to provide it. And the failure as he infers to ask Joe, the harbor master, to help him means that he was remiss in his own responsibilities.

It's a pretty clever technique. Very clever. And I found so many examples of them as I was listening to my distinguished adversary that I wondered if I should use up all my time bringing these things to your attention. But let me tell you, when it comes down to hard tacks that you people are deliberating on the issues in this case. You will not allow this technique of confession and avoidance to divert you from the true issues, the true obligations of the defendant toward the plaintiff.

I just give that for a reminder. Not that we kid, and I use that word colloquially, and perhaps it's not a good word, but we all know what that means.

Now, what are the facts here? The plaintiff contends that he was injured in what we have known as a maritime tort. In the pretrial order that counsel for all parties must submit to the judge long before it reaches this stage, it was admitted by all parties, number one, that the R-5 was in navigable waters. That's part of the pretrial order of the concession for admissions. And so was the Japanese vessel, the YAMAWAKA MARU. So there is no issue there.

It was further conceded that the YAMAWAKA MARU was being loaded with cargo, and let me at this moment describe that as an ongoing cargo operation. It was a continuing, ongoing cargo operation. And you will see from the exhibits, particularly the stow plan which shows that the vessel was loaded pursuant to a plan arrived at, and that the Rudolph Company was required to follow that stow plan.

Now, it is the contention of the plaintiff, ladies and gentlemen, that the defendant provided an unseaworthy vessel. An unseaworthy vessel in our view is a vessel that is lacking either in gear, which would be appliances, or appertainances attaches to the vessel or with inadequate crew, or without proper supervision.

I ask you, ladies and gentlemen, not to confuse whatever knowledge you may have of accidents pertaining on land with automobiles, and so on. This is what we call a maritime accident. And his Honor will tell you the duties and obligations of the party in this type of a case.

So again, I will defer to that charge which the Court will give you. And it is our contention that Mr. McSweeney is a seaman. That's part of the pretrial order.

It is further contended and not disputed that he is a member of the crew. Now, bear in mind while this vessel, the R-5 was 100 feet in length and some 30, 40 feet in beam, or width, it is as much a vessel as the YAMAWAKA MARU was.

The duties and responsibilities of a ship owner doesn't change with the size of the vessel. These are fundamental rules and they remain intact. Whether the vessel is the QUEEN MARY II, if she's in navigable waters or whether it's the R-5. And we say that this duty on the part of a ship owner, the case of the defendant Rudolph, was non-delega In other words, they cannot engage someone else and let him do the work for them.

B7 MR. BROWNE: May I object?

THE COURT: You are getting into areas of law, Mr. Corcoran, and also I don't know that this is really something that needs to be argued. I don't think anybody disputes these facts.

MR. CORCORAN: All right, your Honor.

Now, let's come down to these facts. Inasmuch as his Honor says no one disputes it, then we say there is such a principle known as foreseeability. If I know that a certain thing is going to happen an hour or two hours from now that could cause some harm or danger, and I take no steps or means or measure to prevent it, then you may consider, under a proper charge, that that failure to take such means would be negligence, and at the same time --

THE COURT: I have withdrawn that claim, as you are aware. There is no claim of negligence that is going to be submitted to the jury. I advised you of that yesterday.

MR.CORCORAN: Well, it is our contention that the doctrine of unseaworthiness was breached by this defendant. And how as it breached? Number one, this vessel was lying in Port Newark and was towed to Pier 6 in Brooklyn.

On the day prior to the accident, Mr. McSweeney testified that he was instructed by Mr. Arthur Rudolph, the father of this Mr. James Rudolph, to report on the morning of November 14th to the R-5.

Now, the testimony was that loading had been in process the day before, November 13. Because when Mr. McSweeney came to the pier on November 14th he observed that there were containers on the deck.

He also testified that after arriving at the pier he went aboard the R-5 and went into the tool room and looked for grease and oil, and whatever else is required to lubricate the machinery, and that he at that time did not see any rope or tag-line at all.

Now, do you recall that that issue was skirted, wasn't met head-on? There wasn't a witness brought here to say, yes, there was a tag-line on there. It's the same alibi, avoidance and confession. Maybe they'll forget about it.

But there was no testimony at all to contradict Mr. McSweeney's statement that here wasn't any. Then part of the technique is to divert and say about the onto the deck, under the deck, and so on.

Did Mr. Rudolph here yesterday, upon examination by Mr.Browne, give any statement that under the deck there was a rope? Not a bit. All he answered was that sometimes it's not permanently sealed. And Mr. McSweeney testified that these are just for the buoyancy of the vessel. Nothing

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is kept under there.

Let me tell you, if Mr. McSweeney was not correct and accurate, they'd have a whole squad of people here saying that he was wrong. Because this R-5 has been in possession of the Rudolph people for some time.

Now, the foreseeability on the part of the Rudolph Company required them to make certain, reasonably certain that the vessel that they were going to put into operation was seaworthy. Seaworthy with respect to its appliances and equipment that would necessarily be used in the loading of this Japanese vessel.

This R-5 wasn't just brought there without knowledge of what it was to do. This is a pretty big operation. I think in the length and breadth of this country there is nothing of a greater type of business and operation than shiploading. Sure, we have mines, we do all of that, but in bulk material the loading of a big ocean-going freighter, or ship such as this Japanese vessel which the witnesses testified was to be loaded with unboxed automobiles heavy machinery and containers, they are not putting clothing aboard this vessel, they are putting very heavy machinery, very heavy weights. And for which the Rudolph Company probably gets well paid.

Now, they can't close their eyes and say, now

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we are going to send that R-5 to Pier 6 and forget about it. Bearing in mind, number one, that it was towed, unmanned, from Port Newark two days before. Because nobody aboard that tug, at least nobody aboard the R-5 when it was towed from Port Newark, no proof is offered to show that it was.

So they bring an unmanned vessel and then have it tied up the next day, November 13th, work the vessel and then on the afternoon or early evening of the 13th, Mr. McSweeney is told by the owner of the company, the president of the company, Mr. James Rudolph's father, Arthur Rudolph, you report the next day.

Nobody from the Rudolph Company ever even took a look at that vessel from the time it left Newark, or maybe before that.

Of course, Mr. Rudolph personally testified, I think fairly accurately, that he goes aboard maybe once every two months, maybe on an annual basis of six or eight times a year. No proof as to how long he stays there or what he does. Maybe he goes there and says, hello to somebody.

But there is nothing in this record to show any inspection of this vessel.

Now, you know yourselves if you have an automobile you just can't run that automobile into the ground day in, day out, year-after-year without having it looked at by somebody with regard to repairs, inspection of your tires, and see if they are proper, and so on. This was all ignored.

Let me tell you what that constitutes. That constitutes a callous indifference to the safety of men that work along the waterfront like Mr. McSweeney.

The Japanes vessel, they are only interested in getting loaded. On their way to Japan. The Rudolph Company with its fleet of six vessels are only interested in getting that ship and other ships loaded or unloaded as the case may be into Port Newark, or the Port of New York. It's a continuous ongoing operation.

What's next? What's next? What's next? Look at the vessel. Forget about it. It's hard to believe that, but that's the way this thing was operated. There's not one scintilla of evidence by anybody that they ever looked at this vessel.

So it comes into Pier 6 with no tag-line, and by the same technique you say, well, rhetorical, do you need one? Do you need one? This is a block weighing a thousand or more pounds. Mr. Rudolph, you may recall, said it weighed 2000 pounds.

Then the two-part block that was initially on the boom weighs 500, so we have at least 1500 pounds according to Mr. McSweeney, or 2500 pounds according to Mr. Rudolph

Now, that was raised right up to the top of the boom, some 90 feet, and then they have to lower the boom. Not the load, lower the boom. Because if they tried to other than on the pier, the boom would be laying over the water. You couldn't make that change.

So it had to be lowered over a pier. And the length of the boom with the gooseneck extension was such that they raised -- lowered it to such an extent where it was all clear.

In other words, there was no cargo on that part of the pier where the boom was going to be laid, and then ultimately the boom itself would rest on the pier.

No one disputes that's the proper manner of doing the job, because they would have all the experts that the Rudolph Company has at their fingertips to come in here. They are in the business, Mr. McSweeney is just a worker. They are in the business of doing this loading and unloading.

Hence I say that under the theory of foreseeability, they had an obligation to make certain that the equipment was essential.

Now, you ladies and gentlemen might say, well, gee, what's a rope?

The rope is the difference between his accident and not having an accident. Because if had a tag-line of sufficient length that was enough for that load to go up to the top of the boom, see it had to go up to the top in order for the boom to come out, see, he would have to have a tag-line in excess of 90 feet, because what was he going to do? Let him go and then have a ballon try to catch it?

He had to have it in his hands at all times while the load was going up to the top. Then when the boom was to come down he at least had control over it through a tag-line, a rope. That's how essential that is. But they didn't have it. And to that extent it is our contention that the vessel was unseaworthy.

THE COURT: Mr. Corcoran, was there any testimony whatever that the tag-line had to be 90 feet in length? I don't remember hearing any such testimony.

MR. CORCORAN: Well, your Honor,you may recall the witness testified that the load went up to the top, 90 feet.

THE COURT: Yes, but that has nothing to do with the length of the tag-line. All I am saying is, and I don't want to interrupt your summation, but it didn't seem to me there was any evidence in the record that would support a requirement of a 90 foot tag-line.

MR. CORCORAN: Then how could the tag line be

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gotten on.

THE COURT: No, continue.

MR. CORCORAN: How could the tag-line get on if it wasn't on initially when the load was going up?

THE COURT: That is for the jury to determine.

MR. CORCORAN: All right.

I did say there was no hellicopters there. But again that's one of the techniques by which your attention is to be diverted.

MR. BROWN: Your Honor, I do think that's gone far enough. It's not only me now, apparently it's the court.

THE COURT: I am going to overlook it.

MR. CORCORAN: I am talking about the method of argument, your Honor. I have nothing to say other than that. No one has contradicted Mr. McSweeney that there was such an appliance aboard. He testified that there wasn't. He looked on the deck, there wasn't. He looked in the tool room, there wasn't. There wasn't any in the cabin. And he looked all these places and found none.

Of course we don't know the manner in which certain businesses are carried on, but I dare say in some business you wouldn't be able to find a hammer or a nail. But if there was they were under the responsibility to offer the proof to you and not merely ask you to take blindly statements of counse

There is no proof that there was a tag-line on the R-5 at the time of this occurrence.

Now, under the question of foreseeability Mr. Rudolph says that to his knowledge the R-5 was to load 15 tons, but that it had a capacity of 36,000 pounds, or 18 tons.

Now, is it likely that a business like Rudolph's business, one of the ship loading firms in the Port of New York and Port Newark would not know that the Japanese vessel was going to load containers of 25 tons? And if they honestly said, no, we don't know, what about their duty to look? Can he stay in an office in Brooklyn and let the operation go by itself?

Mr. McSweeney testified that he saw Mr. Rudolph about once in two months. What kind of supervision is that? I say that the Rudolph people knew that these containers were to go aboard because certainly they had the manifest, or they can look at the stowage plan and see what cargo and where it's going to go, and you will see the stowage plan which has been offered in evidence.

It's not a haphazard job, loading or unloading a vessel. It's not haphazard. Because the vessel has to be seaworthy going out that it doesn't list. Because that's quite a journey from New York over to Japan. And it's hard to believe, ladies and gentlemen, that a company that's in the business with six of these large water cranes, floating cranes that are operating daily in both ports, Newark and New York, does not know what it is required to lift. But, it says no. And that's the way it seeks to say, well, we weren't at fault.

The mere fact that they say no, we didn't know it, that doesn't relieve them of their responsibility to look for it. It's like the fellow saying, I'm going to build the World Trade Center, but I don't know how many stories I'll make it. Or is it going to have a roof on it or not.

So their mere claim of ignorance doesn't absolve them. They have a further obligation to find out for themselves and not one bit of proof was offered as to what overt act the Rudolph Company did through its employees or agents to find out definitively what was the weights to be lifted. And I say that's their responsibility.

THE COURT: Mr. Corcoran, I think this might be a good time to take a very brief recess, if that's all right with you.

MR. CORCORAN: I will do what you say, your Honor.

THE COURT: All right, we will take a very brief recess.

Thank you.

(Recess.)

(Open court - jury present.)

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THE COURT: Proceed, Mr. Corcoran.

MR. CORCORAN: You may recall, ladies and gentlemen, that Mr. Rudolph testified that the pier superintendent has authority to order Mr. McSweeney to change blocks. But when he asked for help from Mr. Chuck he was met with a hurricane of obscenities as to why Mr. McSweeney didn't change the block the day before, and you were hanging around and doing nothing.

Of course the facts are that Mr. McSweeney didn't hang around, wasn't on this pier, wasn't on this vessel the day before and had worked on the R-6 the day before at another ITO pier at 21st Street in Brooklyn.

Isn't this whole area of proof evidence,positive evidence that there was no supervision? Because Mr. Rudolph says the pier superintendent can order him to do that. Isn't this the responsibility of Rudolph to supervise this job? Why does he say, well, yes, the pier superintendent can do it. The pier superintendent isn't looking out for the interest of the Rudolph Company and its crew or otherwise.

Think of their own concern of getting the boat loaded. But it's good proof and it's clear proof because there is no movements to cover up. It shows no supervision, period.

Now, the other item was the absence of the tag-line

My adversary said it to you, there was no need for one. Now watch this one. The next time, or the next argument he gives he asked a rhetorical question: Why didn't Mr. McSweeney call for one? You see how it is? He's saying you don't need one, then he turns around and says, put the blame on McSweeney. He didn't call for it.

First of all Mr. McSweeney testified that the Rudolph Company's office is not open till 9 o'clock,and we are talking about before 8. In fact, the accident happened about 8:10. It's a rhetorical question. It's supposed to remain in your minds to lull you into the belief, Rudolph did nothing wrong, McSweeney did. When in the first instance is the responsibility of the ship owner to do this.

So I say under their duties as a ship owner, as a ship operator being in this business for so long under reasonable foreseeability they failed to do what they were required to do.

Again attempt is made to put the blame on Mr. McSweeney. What could Joe the harbor master do for you? Well, he answered forthrightly,at least he'd help him. And it's fair to assume that if there are two or more people helping Mr. McSweeney and holding that block it's going to be more managable.

But again the diversion is to take your mind off

Rudolph, put it on Joe the harbor master, who is the employee
of ITO. Put it on him, don't put it on us. That's the
9 alibi.

I don't believe they succeeded in diverting your attention. Nor have they succeeded, I state, that they have put any blame on Mr. McSweeney. He takes his orders from the boss who in this case was Mr. Rudolph. He reports to work where he's told. He starts as soon as he comes on the job, 8 o'clock, when the whistle blows. Everything goes when the whistle blows. That should have been done the day before.

You know, you cannot hide your head in the sand like an ostrich and say, well, I didn't know that. You can't claim insulation from responsibility and say, well, gee, I didn't know.

The law says, I contend, that they should know. And that was their duty.

Now with regard to the damages here, ladies and gentlemen, Mr. McSweeney was earning a fairly good wage. And he had worked satisfactorily for the Rudolph Company for many years prior to this occurrence. Mr. Rudolph was forthright enough to say that he was a satisfactory employee, and there is no question in my mind that he was because Mr. Rudolph went out of his way to take him from the hospital to his home. It was a very nice gesture.

When he came back to work after 16 weeks being out of work he was put on light duty. Mr. Rudolph conceded that. And Mr. McSweeney testified that the light duty meant four hours a day that he worked, four hours a day until he was able and sufficiently strong enough to resume his regular duties on an 8 hour basis.

Then your attention is sought to be diverted by saying, well, he didn't lose anything, he got himself the job now of engineer, he's making more money. As if that's going to pay him for the injury, you know. Now he's getting more money. We are not at fault, we have given him a better job.

The fact of the matter is as a crane engineer here all he does is push levers. He doesn't have the type of work that he was doing as an oiler or a fireman where he had to pull lines and do all that kind of work. So he is able to go back to work as an engineer, but there was no proof that he could go back to work as an oiler and do this heavy work that he had been doing before.

Well, they say, well, I think we are to be excused now because we have given him a job that makes more money. That's a pretty good defense. For the physical injury that he has.

Now we say that this injury was severe and a competent producing instrument of great pain. Here you had a doctor come in and testify that when he was called he went to Mr. McSweeney's home and saw him on the floor. And that is not a place where any person, man or woman, particularly an outgoing man who is doing heavy work, likes to be seen, on the floor. It means that his injury was so severe he couldn't save his own ego to get up off the floor.

I don't think a boxer in the ring like to be on the floor. Nobody does. It's an admission of complete surrender. So he could not get up, so the doctor testified.

Mr. Rudolph was forthright enough to say that when he took him from the hospital, Long Island College Hospial to his home, he was in pain. He even went to the point of saying,yes, I saw it in his face. And then after two visits to Dr.Gudelisdo's office he was referred to the orthopedic group where he came under the care of Dr. Cook, which was a group of five orthopedic specialists.

When we asked Dr. Cook what the injury was, "Question, You mentioned the lumbo-sacral spine. Could you tell us what that means to you as an orthopedic surgeon?" And this was read "Answer, this means that the patient had a tearing of the ligamentous soft tissue around the joints and support of his whole back to the point where they had actually been torn. Edges were severed."

Now, if you think that a lumbo-sacral sprain is something, you know, very insignificant, because we use that word sprain, you know, in layman's language, but here we have an orthopedic surgeon telling you what a lumbo-sacral sprain is.

To them it's a tearing of the ligamentous soft tissue. And when we probe that a little further Dr. Cook mentioned that this caused a protrusion from the contained area where the disk was, if you remember he might have complimented me, I felt it was, when I asked him if that acts like a cushion, he said, that's a pretty good expression. And that's what it is.

It's a semi-liquid substance that nature, or God has put between the two vertebrae to pick up the shock and the thrust to which the spine is subjected.

Then when he said that there was a protrusion that disc was coming out of its contained area. And he said that constitutes a herniation.

At page 21 of the deposition I had asked Dr. Cook,

"Can you state with reasonable certainty as a physician and surgeon that he did have a herniation of the disc based upon all the findings and examinations you conducted?

"A I felt that he had a herniation of the disc

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without any neurological signs."

You may recall that Dr. Cook explained that such an injury can be present without the existence of neurological signs. Andthe neurological signs are the leg raising, and so on, and so forth, and the different tests that the neurologists seeks to fortify his opinion with by sensation of the skin area about the body.

I don't think there is any dispute as to the seriousness and depth of the injury that Mr. McSweeney suffered, because here is a man that has a wife and three children. He has work available to him. He is not going to say away 16 weeks. There is no motivation in him to do that.

The proof was offered that Dr. Cook repeatedly stated on his various visits that he was not ready. In fact, he wasn't ready on March 1, 1971 to do his regular work, because Mr. Rudolph, the employer, put him on light duty. There may be some people in life that will take time off if they get a scratch. Then there are people that will work no matter what.

Here we have a man who is earning a reasonabl good wage on an annual basis, long with the firm, who if he wanted to go back would get more money as an engineer, but he wasn't able to. He wasn't going to subject the Rudolph firm to any other possible injury if he wasn't able to do his work.

No one disputes the period of 16 weeks. That's conceded. And no one from this witness chair stated that Mr. McSweeney could have gone back in one week, two weeks, five weeks or ten weeks. No, they don't make that an issue.

So I say, ladies and gentlemen, consider for yourselves, supposing now, I am not a smoker, you pick up a cigarette and you light it and you accidentally burn your finger. You know that happens. It's happened to me when I used to smoke cigars. Now, that pain is intense, but it goes away after a while.

I'm explaining this to you merely for you to conjure up in your mind the seriousness of the pain that he went through. The proof was offered that he could not even ride the short distance to the doctor's office without pain. Dr. Cook said that. Mr. Rudolph said he was in pain.

But just try to multiply the degree of pain that you get when you burn your little finger, or your thumb, or whatever, then it goes away after an hour or two or three, whatever it is. But remember the pain that this man had for weeks and weeks and weeks and weeks. And the fact that he had to go to the hospital for traction, which the doctor said in and of itself was a competent producing cause of pain. The treatment itself was painful.

10

So I say, ladies and gentlemen, we have a case of a man wholly free from negligence, who was injured in a very severe manner and whose pain and suffering continued and was not relieved at least in substance by any of the pain relaxers or pain relievers.

Visualize if you will, please, the discomfort of lying bed whenever he could go to bed. Till he could sleep. Did it bother his general nervous system? Always knowing that you have pain which you can't discard, like taking off your coat and putting it down. You can't do that. And not one person here, profession or otherwise in the medical field, has claimed that for one moment Mr. McSweeney was not experiencing this very deep discomfort of pain.

Of course when we recognize what a herniated disc is, which the doctor says is a tearing of the ligamentous tissue around the vertebrae where all the nerves are centered. Try for a second to recall some time when you were trying to get into an amphi-theater, or the Yankee Stadium or whatever and you had to stand for a long time just standing there doing nothing. The pain in the back. Or sometime when you have a ride in the subway you don't get a seat and you are tied and exhausted, you are standing.

Imagine his pain, just try to equate your own experience and see the extent of the pain.

Now, we don't have any measuring scale, we don't have any barometer to measure pain and suffering insofar as its worth in dollars. Mr. McSweeney I dare say would rather have his health and no pain than any dollars. And the only thing that you members of the jury can do is to compensate him reasonably for that pain and suffering and for the disability that he suffered. And when counsel said that he didn't go to a doctor, the question was asked, did you see Dr. Cook after August of 1971, there was in inquiry as to what other doctors he may have gone to. And that was the source of the limitation of that question, Dr. Cook didn't see him thereafter.

I think you should take into consideration the money loss that he suffered by being out of work. We have great unemployment in some areas now. No one wants to be unemployed. Apart from the fact that the monies that you can earn can buy something for your family and yourself, but the emotional mental state of being unemployed in and of itself is a hurt for any type of person who is not, say, a hobo, doesn't care.

But the average person likes to be employed, engaged. In fact, and I say this with great respect, some of them senior judges of this court in our Court of Appeals, they don't want to be unemployed. They come back voluntarily

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even though they don't have to. They want to be employed.

So I say that's a factor, too, that you people should consider. What can you people say is the fair and reasonable value that you should put on this case? Having in mind the nature of his injury, the extent of it, pain and suffering after the loss that he has suffered, wages and elsewhere. I think we are suing in this case for the sum of $200,000, is what we are claiming in this complaint, which is on file in this court. And I am going to ask you ladies and gentlemen to use your common sense and judge fairly what would reasonably compensate Mr. McSweeney for the injuries, the pain and suffering, and deprivations that he has suffered by reason of this untoward occurrence.

Thank you very much.

THE COURT: Ladies and gentlemen, we will stand in recess until a quarter of two at which time I will charge you.

I will see you at 1:45.

(Luncheon recess.)

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AFTERNOON SESSION - 1:45

CHARGE OF THE COURT

HON. RICHARD OWEN, D. J.

(Open court - jury present.)

THE CLERK: This court is about to charge the jury. Will the marshal lock the courtroom door, please.

THE COURT: Now ladies and gentlemen may I at the outset of my charge thank you for the careful attention I have seen you give to the proof over the days we have been listening to the evidence in this case. It appears to me from what I have observed that you are fully prepared to perform your final function as jurors here, which is to decide, as I told you at the outset, what the fact issues are in this case, what actually happened.

Now, as I said at the outset, you are the sole and exclusive judges of those facts. It is you who will pass upon the weight of the evidence. It is you who will determine the credibility or the believability of the witnesse that you have heard. It is you that will resolve such conflicts as you may find exist in the testimony. And it is you who are to draw such reasonable inferences as may be warranted by that evidence.

I caution you that you may not and must not speculate or guess, nor may you conjecture.

I also wish to call to your attention my statement to you that upon becoming jurors you do not leave your common sense in the hallway. You keep it with you at all times and you apply it at all times.

My function at this point in the trial is to instruct you on the law that you are to apply in this particular case given the various alternatives that appear to flow from the evidence. It is your duty to accept these instructions of mine and to apply them to the facts as you may find them. You are not to focus solely on any single part of my charge, but are to consider it as a whole.

In your determination of the facts you will rely upon your recollection of the evidence. What any attorney may have said at any time during the trial or during summation or what I may say during these instructions with regard to any matter of evidence or any bit of proof is not to be taken in place of your own recollection as to just what that testimony actually was.

Since it is your recollection, that is your collective recollections that govern and you should be secure in that recollection, if you have any concer-n about it you may have testimony reread to you. You may ask for and take into the juryroom any exhibit that has been received in evidence.

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I must say that because I may comment on certain proof or evidence does not mean that I regard those matters as any more important than any other evidence in the case. I may use certain proof or evidence as illustrative and you are of course to consider all the evidence in this case in arriving at your conclusions, not just those parts which the attorneys may have drawn to your attention or that I may draw to your attention in connection with this charge.

Now, this is a relative simple case of basically limited issues. The plaintiff, Mr. McSweeney, seeks recovery of damages from two corporations, one of which owns and one of which operated the barge crane R-5 in November of 1970. And M. J. Rudolph Co., Inc. is the owner of the barge, and M. J. Rudolph Corp. was the operator.

For all practical purposes I am going to call them Rudolph Company, or, the defendant. But they are these two separate entities that are before you.

The plaintiff seeks to recover against Rudolph based upon an ancient law of the sea, warranty of seaworthiness, which you may have heard mentioned here before.

I have withdraw from your consideration any question of negligence by Rudolph and you are to put from your minds any question as to whether Rudolph was negligent.

Also Rudolph remaining in this case is not libel for nor charged with any negligence of any employee of ITO, if you conclude there was such negligence, nor are they responsible for any abusive language used by any employees of ITO.

The only basis upon which the plaintiff can recover here, as I say, is if you find that there was a breach of the warranty of seaworthiness. And as to that I shall define it for you in some detail hereafter.

Now, the R-5 crane is a crane floating on a barge, it is a vessel. And I charge you that it is a vessel. And Mr. McSweeney working aboard that crane or barge was a seaman on that vessel on the 14th of November, 1970.

Keep this in mind so that you have it as background in which to access the balance of the charge.

Now, this warranty of seaworthiness imposes upon the owner of the vessel the duty to supply crew members such as Mr. McSweeney with a seaworthy vessel. By that is meant one reasonably fit for its intended purpose or use.

Or, putting it another way, one reasonably adequate and fit for crew members to discharge their functions.

The ship owner's duty to provide a seaworthy vessel extends to all parts of the vessel, whether it's the hole of the deck,the working area or in case the crane and the blocks. This duty is a continuing one and is non-delegable.

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By that is meant that it cannot be passed on to anybody else. As you see emerging, I am sure, seaworthiness is a condition of the vessel. It is not something happening, it is a condition.

Now, as I have said before, the duty to supply a seaworthy vessel is an absolute duty, and if the vessel fails in that duty, and as a proximate result of that failure a crew member such as Mr. McSweeney is injured, then the vessel owner is libel for the resulting damage.

This absolute liability is imposed even though the vessel owner may have been free from fault and whether or not its owners or operators knew of the unseaworthy condition.

Liability for an unseaworthy condition does not depend in any way on negligence, fault or blame. In short, even the exercise of reasonable care does not relieve a vessel owner from its absolute duty to those engaged in the ship's service to furnish and maintain the vessel and all its parts in reasonably fit condition for its intended use.

Bear in mind again, unseaworthiness, or seaworthiness as youmay see it is a condition. How the condition came into being, whether by negligence or otherwise, if you should so find, is irrelevant to the ship owner's liability. It is the fact of unseaworthiness, if you find that it exists, that renders the ship owner libel.

If as a proximate result a crew member is injured, and by proximate result I mean an unbroken chain of events flowing from an unseaworthy condition and leading to the injury complained of, if that chain of events flowing from an unseaworthy condition was broken by some other intervening act which caused the injury, then the proximate cause between the unseaworthy condition and the injury is not established and the ship owner would not be libel.

In other words, there must be a causal connection, proximate cause, between the alleged unseaworthiness and the injury.

Now, I refer to the ship owners absolute duty to furnish a seaworthy vessel. However, I want to caution you that this does not mean that the owner was required to furnish an accident free ship.

In deciding whether a vessel is seaworthy the standard to be applied is not absolute perfection, but reasonable fitness for intended use. Thus the crane owner's duty with respect to the vessel and its crane and block here was that they be reasonably safe to be changed, changing a two part block to a four part block in the customary manner.

Now, with these general observations on the seaworthiness doctrine let us continue with the plaintiff's claim under that doctrine.

The mere fact that Mr. McSweeney suffered an injury to his back does not establish unseaworthiness or entitle him to recover. The crane owner is not an insurer of his safety. Mr. McSweeney having made a claim of damages here has the burden of proving them, and has the burden of proving that they were proximately caused by the unseaworthy condition that he claims existed which, too, he has the burden of proving.

He must establish his claim by what the law terms a fair preponderance of the evidence. This "fair preponderance of the evidence" refers to the quality of the evidence rather than the number of witnesses. It means that the evidence submitted by the plaintiff must be more persuasive and more convincing to you than that opposed to it.

To put it in homely fashion, you must find the fact in issue that you are considering to be more likely so than not so. You may say that the fact is proved by a fair preponderance of the evidence when all the credible or believable evidence tends to persuade you that the witness or witnesses are telling the truth.

I would, however, note that just because the testimony of a witness, and in this context the term witness includes the plaintiff as well who testified here, just because the testimony of a witness may not be contradicted does not compel you to accept it. You may accept it, you may reject it, taking into account among other matters the demeanor of the person on the witness stand, the impression that person made upon you, the interest in the case that witness may have had, among other factors.

Now, the controversy here centers about what happened to plaintiff McSweeney on barge crane R-5 on November 14, 1970, and where the responsibility for this occurrence lies.

Plaintiff claims that the R-5 was unseaworthy in two respects: One, there was an inadequate crew to change from a two to a four part block in that that task required additional competent persons to assist him in its performance; and, two, plaintiff claims that there was no tag-line available to him in changing the block.

He then contends that while starting to change the block under such unseaworthy conditions, the block lurch and twisted causing his back to twist, and that it was the inadequate crew and/or the absence of a tag-line that proximately caused the injury that he says he sustained.

If you find on all the evidence as the plaintiff claims that there was an inadequate crew under the circumstances, or that a tag-line was required under the circumstances, then I charge you that it is sufficient to find that an unseaworthy condition existed.

If you further find that Mr. McSweeney was injured and that such an unseaworthy condition was the proximate cause of his injury, then you must return a verdict for the plaintiff in the amount of such damage as you find he suffered.

Defendant Rudolph disputes the plaintiff's claim as to the unseaworthy condition claiming that the changing of the block has always, even on bigger Rudolph vessels, been within the ability of one competent crew member to perform.

Defendant also contends that plaintiff's injuries were not as great as claimed, and, more importantly, even if plaintiff has proved an unseaworthy vessel, which defendant disputes, defendant says that the claimed injuries were not proximately caused by any such unseaworthiness.

In other words, Rudolph denies that its vessel was unfit, or that the R-5's condition caused any injury to the plaintiff.

Defendant ship owner also claims that even if you should find that it provided an unseaworthy vessel, which as I say it denies, plaintiff's injuries were caused solely and only by the plaintiff's own negligence in attempting to change the block by himself, and without a tag-line which, as an experienced oiler, he should have known he should not do.

12 Finally defendant contends that even if you find unseaworthiness was the cause of the injury that Mr. McSweeney contributed to his own injury by his own carelessness and negligence in attempting to change the block himself, and that if you find a contribution to the injury by his own negligence damages must be reduced and apportioned accordingly

Now, I have only referred in general terms to the contentions of the parties, and as I have said before, and I am going to review a little of this later, you should review all of the evidence in this case and all of the contentions of the parties, because all of the evidence or the lack of it as the case may be is important for you to consider.

You will consider all the probabilities in making your determination as to whether the plaintiff by the weight of credible and believable evidence has sustained his burden of proving the unseaworthy condition which he claims caused his injuries.

Your determination must be based upon the facts in this case and the reasonable inferences that you may draw from those facts.

If upon all the evidence you find that the plaintiff has sustained his burden, and that a condition of unseaworthiness existed, and that such a condition was a proximate cause of the accident, either in whole or in part, then the plaintiff is entitled to recover.

Now, the burden of proving Mr. McSweeney contributorily negligent is upon the defendant ship owner, and the defendant ship owner has the same burden of proving that if you are to reach that issue as the plaintiff has as to the rest of the case and I described that to you earlier.

In this connection if you should find upon all the evidence that unseaworthiness existed, then I charge you that the plaintiff did not assume the risk of working aboard this vessel. But I also charge you that this did not relieve him of his duty to exercise reasonable care for his own safety given all the circumstances. And if he failed to do so, as I said earlier, and thereby contributed to the accident, this will go to a reduction of damages as to which I will instruct you in a few minutes.

If upon the evidence you find the plaintiff has sustained his burden of proof on the claim of unseaworthiness and the proximate cause to the injuries alleged, then and only then do you reach the question of damages.

If Mr. McSweeney has failed to sustain his burden of proof on the claim of unseaworthiness, or on the proximate cause to his injuries, you are to report a verdict in favor of the defendant Rudolph and proceed no further.

I want to clearly state to you the fact I am instructing you upon the elements of damage to be considered should not be regarded by you as any view on my part as to who is entitled to prevail, or whether damages are to be awarded or not, or, indeed, in any way as to how you are to decide this case. That, as I have already told you, is exclusively your function.

Instructions as to damages. Instructions by me on the law of damages are given to you solely for your guidance in the event if upon all the evidence you find the plaintiff is entitled to a recovery in some amount.

Mr. McSweeney, as on the issue of liability, has the burden of proof on the issue of damages as well.

In sum, he must establish a causal relationship between the event he claims was alleged unseaworthiness, and the claimed damage or injury to himself that flowed from it. And as to the actual damage that he sustained.

Now, the purpose of the law is to award as far as possible just and fair compensation for the loss which directl results from the accident in question.

Damages must be purely compensatory and reasonable, and neither inadequate nor excessive. If that sounds general, it is general.

The matter rests in your sound discretion, and you will be guided by your common sense and your experience.

If you find in favor of Mr. McSweeney against defendant on the issue of liability, as I say, only then do you concern yourself with the amount of damage which he may recover.

As to that portion of damages for loss of earnings, you must take into account that plaintiff has a duty to mitigate damages if possible. You may not add any sum to the amount of any verdict for federal or state income taxes. As your verdict, if you should find that damages, is not taxable income to the plaintiff.

If you find that he is entitled to recover, you must render a verdict in a sum of money which will fairly compensate him for all loss proximately resulting from the injuries sustained, including lost wages and such conscience pain and suffering which you find to have been caused by the injury.

Thus Mr McSweeney is entitled, should you reach this issue, to be reimbursed for the loss of earnings he suffered in 1970 and 1971, if you find that loss to be due to the injuries sustained aboard the defendant's vessel and the defendant chargable for them.

There is testimony by plaintiff that his lost wages while out of work were $7,500. Now, any award that you make for earnings you may not estimate, but must be calculated for the period of time that you find Mr. McSweeney was disabled by his injuries from carrying on his work and in an amount you find he would have earned during this period had he not been disabled.

Now let me perhaps a little more sharply define some of the issues as I have said before here and elsewhere. and give you some thoughts as to how you might go about resolving them again.

As I say, those issues, that is for you and you alone to determine in accordance with the evidence in the case, and my charge to you on the law. As I see it there has been no issue raised before you that the plaintiff did in fact hurt his back on November 14, 1970. But there are, however it would appear, several major issues that you will have to decide, and these, as I say, are suggestions on my part, because this is your province, so I am not directing you on it, I am merely giving you suggestions for guidance.

One,these are several major issues, I suggest you may wish to consider along the decisional path. One, could the operation that is in issue here be performed by one man under normal circumstances? And there is no claim here that the wind, weather or waves were other than normal;

Two, was a tag-line reasonably required for this operation?

Three, if the plaintiff tried to do this operation where, A, the job could not be performed by one man under normal circumstances or, B, if a tag-line was reasonable required, then two other questions I suggest may well be considered.

First, was the plaintiff an experienced oiler, negligent in trying to do the job without either more help or a tag-line? And, second, you may consider if you get there were either of these omissions by the vessel the proximate cause of any injury which the plaintiff says he suffered?

Item 4, if you conclude the plaintiff's injury was so proximately caused, then what was the extent of that injury? What damage did the plaintiff suffer?

Five, if the plaintiff was negligent in whole or in part, to what extent does this affect any award you feel he should recover?

Again, as I say, this area of fact determination is in your province alone so I wish you to regard these facts of mine as merely suggestions to you.

13 In resolving some of these issues, such as "was more crew necessary" you should consider the testimony of the plaintiff that this job required additional men and

that the ITO harbor master, according to the plaintiff, said that he would help.

The defendants, on the other hand, point to, and you should give consideration to the testimony of Mr. Rudolph that as long as he has been with the company he has seen it as a one man job, and that while others may help in it, and he has seen them help, you may consider whether this was for the purpose of saving time rather than the necessities of the task.

On the question of the real need of another man, the defendants point to the plaintiff's testimony that when he started the particular job involved in this case the ITO employee who had offered to help was somewhere behind and out of his vision and not in fact helping. And plaintiff began anyway.

On the question of whether a tag-line was required, you should consider that the plaintiff as a long time oiler gave testimony to the effect that when he was doing the job alone there should be one.

Defendant on the other hand calls your attention to the fact that in pretrial testimony the plaintiff stated that sometimes he used a tag-line and sometimes he did not, but did not in this instance because he was too rushed to go back to the vessel to get it.

Query, was there a tag-line aboard? Was its use necessary? These are matters you may wish to consider during your deliberations. You and you alone must determine and decide where the truth lies here.

Now, if you find that the vessel is libel to the plaintiff here but that Mr. McSweeney was guilty of negligence which in some way contributed to causing the occurrence, then your verdict will be against the vessel owner and for Mr. McSweeney. But Mr. McSweeney's damages must be reduced by you in proportion to the amount you find of his contributory negligence.

In that event you would determine the damages to be awarded in the following manner: First you would determine the amount of his damages in dollars without considering the effect of any negligence on his part;

Second, you will determine the percentage of the negligence you find is attributable to Mr. McSweeney. The extent of fault, I should say. Then obviously you reduce the amount of his damages by the previously determined percentage attributable to his fault.

Of course if you find that Mr. McSweeney was not contributorily negligent, then you would make no reduction whatsoever andaward the total damages that you have determined.

In deciding the fact issues relevant to this and to any other aspect of the case you may be called upon to decide credibility or believability of the witnesses, including the plaintiff who was a witness, some of whom were contradicted by others.

In determining the credibility of each witness, this applies to a medical witness as well, you should consider the demeanor of the witness, how he impressed you, his interest if any in the case, whether he was frank or forthright or evasive, whether there was a motive to falsify, the witness' opportunity for observations as to matters which were the subject of his testimony.

In short, ladies and gentlemen, in deciding whether a witness' testimony is credible or believable, what you do, to use a colloquial expression, is to size him up. To determine whether he is reliable and trustworthy.

Again I urge you to use your common sense here as well as in all other aspects of your deliberations. If you find that any witness has willfully testified falsely to any material fact you may disregard the testimony of that witness in its entirety, or you may accept such part or portion of that testimony which commends itself to your belief, or you may find is corroborated by other evidence in the case.

You should not be concerned, and I am sure you will not be, with who the parties are here. The fact that the defendant is here in the person of two corporations must not enter into your deliberations in any way because you are ministers of justice and justice cannot prevail if sympathy or prejudice enters into your deliberations.

Your oath is to render justice fairly and impartially without fear or favor and to decide the fact issue solely upon the evidence in this case.

Each juror is entitled to his or her own opinion, but you are required to exchange views with your fellow jurors. That is the very purpose of deliberation. It is your duty to discuss the evidence.

If you have a point of view and if after reasoning with other jurors it appears your judgment is open to question then of course you should have no hesitancy whatsoever in yielding your point of view. But that is only if you are convinced the opposite point of view is really one that satisfies your own conscience and your own judgment.

You are not to give up a point of view that you conscientiously believe in simply because you are outnumbered or outweighed.

I finally charge you that to return a verdict it must be a unanimous verdict of all six jurors and shall be either for the defendant or for the plaintiff in some amount.

Now, gentlemen, are there are any requests or exceptions? Mr. Browne?

MR. BROWNE: None, your Honor.

THE COURT: Mr. Corcoran? At this point all you have to say is yes or no.

MR. CORCORAN: Oh, yes.

THE COURT: Very well. We will retire to the robing room. If you will stay in place please, ladies and gentlemen

(In the robing room.)

THE COURT: Yes, sir?

MR. CORCORAN: I respectfully request the court to charge the jury that if the defendant Rudolph had no supervision, only inadequate supervision of the work of operating the R-5 in the loading of the Yamawaka Maru, then the jury can consider this as to whether or not the R-5 was unseaworthy.

THE COURT: I don't see that supervision is in this case at all, so I decline to charge that.

MR. CORCORAN: Exception. I respectfully request the court to charge the jury that if the defendant Rudolph failed to furnish additional assistance to Mr. McSweeney in changing the block that may be considered as an indication of unseaworthiness, and such person may not be members of the crew of the R-5.

THE COURT: I think to the extent that the inadequate crew is before the jury I fairly charged it, so I decline to charge in the form you request.

MR. CORCORAN: I may say, your Honor --

THE COURT: I don't recall that anybody --

MR. CORCORAN: You said that they have to be members of the R-5, and I dispute that.

THE COURT: I didn't say that.

MR. CORCORAN: Yes, you did, your Honor.

THE COURT: Well, in any event I stand on the charge as it is, and in any event I don't remember there being any testimony that Rudolph was requested to furnish additional men.

All right, go ahead.

MR. CORCORAN: But the point that I'm making, your Honor, is that by limiting the additional assistance for members of the crew may mislead the jury, because Mr. Rudolph testified that he used longshoremen other than on the crew and he used longshoremen from other places.

THE COURT: All right, your exception is noted.

MR. CORCORAN: I also request the court to charge the jury on the question of negligence.

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THE COURT: No, that issue I have removed from the case.

MR. CORCORAN: I understand. I respectfully request the court to charge that under the provision of the Jones Act it is appropriate and proper to accept admissible proof on the question of negligence of the defendant Rudolph.

THE COURT: I don't understand what you are saying with regard to the charge.

MR. CORCORAN: Well, with respect to the Jones Act under which this action is brought along with the general maritime law I respectfully request the court to charge the duty of negligence, or the duty which the defendant Rudolph had under the Jones Act with respect to negligence.

THE COURT: Well, whatever it is I am going to stand on the charge as I have given it.

14 MR. CORCORAN: Exception.

I respectfully request the court to charge the jury that there is no proof in the case that the plaintiff, Mr. McSweeney, did not go to other doctors after August 1971, but that he did not see Dr. Cook thereafter.

THE COURT: That is a fact matter. I decline to comment on it. Mr. Corcoran, do you have anything else?

MR. CORCORAN: No, your Honor.

THE COURT: All right.

(In open court.)

THE COURT: Now, Mrs. Carnival and Mr. Butler, unhappily the time has come when I must excuse you from further service with my thanks for your care and attention and your prompt attendance.

(Alternate jurors excused.)

THE COURT: Will you swear the marshal, please?

(Marshal sworn by the clerk.)

THE CLERK: Will the jury please follow the marshal out.

(The jurors leave to commence deliberations.)

THE COURT: Mr. Corcoran and Mr. Browne, I am sure you would be prepared to stipulate that if the jurors ask for exhibits that are in evidence they may be given to them without the necessity of reconvening?

MR. BROWNE: Yes.

THE COURT: Why don't you put them on deposit with Mr. Dorsa. Is there any problem with that, Mr. Corcoran?

MR. CORCORAN: No, sir.

THE COURT: Very well.

MR. CORCORAN: In fact, I am handing the exhibits over to Mr. Dorsa.

MR. BROWNE: The only exhibit I have is that state-

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ment, Judge.

MR. CORCORAN: That statement is not in evidence, your Honor.

MR. BROWNE: It certainly is.

MR. CORCORAN: Which one? Oh, yes, that one. Yes. I thought he meant the report of the doctor. The letter of the doctor.

MR. BROWNE: I think that's all I have, and some depositions, too.

(Recess.)

THE COURT: Gentlemen, I have a note which reads "What is the definition of seaworthy? What is the definition of unseaworthy? After deciding either one what should we consider? Or could we possibly have the Judge's last three pages of charge to jury?"

Now, I don't know how they wrote my charge up by pages, but I am going to give to them from the middle of three pages from the end where the subject matter begins and go to the end and see if that satisfies them.

I shall charge them on seaworthy from my charge and I shall tell them that if they found the vessel seaworthy they need proceed no further, but return a verdict for the defendant.

If they find the vessel unseaworthy, then they must go on to consideration of any other matters as to which I earlier charged them.

Is there any problem with that? Mr. Browne?

MR. BROWNE: That sounds fine, Judge.

THE COURT: Fine. Mr. Corcoran?

MR. CORCORAN: Except that I reiterate my original exception.

THE COURT: Well, let's not get into that.

MR. CORCORAN: No, I understand that, but I am not waiving my --

THE COURT: You waive nothing. All right.

(Jurors enter the courtroom.)

THE COURT: Now, I have your message and I am going to read to you from my charge where I define seaworthy. I did not define unseaworthy, I think, except that the two of them are opposite sides of the same coin, either one or the other. And I will attempt to meet the note as fully as possible.

Incidentally, if you have questions of the court do not give them to me orally, they should be written. And one thing I would say to you is that at no time should you communicate to me any numerical division you might have. If there came a time where you were unable to become unanimous you can report that fact, but you should not report to me where you are if in fact that is the case.

Now, what is the definition of seaworthy? The R-5 crane floating on a barge is a vessel, and Mr. McSweeney was a seaman on that vessel on November 14, 1970.

The warranty of seaworthiness imposes upon the owner of a vessel the duty to supply crew members such as Mr. McSweeney with a seaworthy vessel. By that is meant one reasonably fit for its intended purpose or use.

Putting it another way, one reasonably adequate and fit for crew members to discharge their functions.

A ship owner's duty to provide a seaworthy vessel extends to all parts of the vessel. Again repeating what I said before, as you can see emerging, seaworthiness is a condition of the vessel, it's not something happening, it's the vessel's condition.

How that condition came into being, whether by negligence or otherwise, is irrelevant to the ship owner's liability. It is the fact of unseaworthiness if you find it exists that renders the ship owner libel.

If you find other things such as proximate cause and damage, but that's not part of the question you asked of me. The fact that the ship owner has an absolute duty to furnish a seaworthy vessel does not mean that the owner is required to furnish an accident free ship.

In deciding whether a vessel is seaworthy the standard to be applied is not absolute perfection, but reasonable fitness for intended use.

Thus the crane owner's duty with respect to the vessel and the crane and the block here was that they be reasonably safe to be changed from a two to a four part block in the customary manner.

Now I trust that meets that first two-part request.

Now, your next question was, after deciding either one what should we consider? In more narrative form, if you find that the vessel was in fact seaworthy, then you need proceed no further for you find for the defendant and you should report that verdict. If you find the vessel to be unseaworthy in either of the two respects that I have charged you with regard to either the alleged inadequacy of crew or the alleged need for a tag-line as we discussed, if you find the vessel unseaworthy in either of those respects, then you should go on to consider whether the unseaworthiness that you find was the proximate cause of the injuries plaintiff claims.

If you do not find that it is proximately so caused, then you should again return a verdict for the defendant.

If you find that the unseaworthiness was the proximate cause of the injury, then you shall go on to consider what the damages are that flow from that injury, and in accordance with my charge you shall consider the question of contributory negligence that may or may not be applicable according to what you find in that particular.

Now, does that fairly meet the next question? All right.

Now, taking the last three pages of my charge I find that there is a subject that begins in the middle of the third page from the end, and I will just begin to read and I trust it meets with what you are asking.

In deciding the fact issues relevant to this and any other aspect of the case that you may be called upon to decide you are obviously called upon to determine the credibility or believability of the witnesses.

Is this what you had in mind? Very good.

Including the plaintiff. Some of whom were contradicted by others. In determining the credibility of each witness, and this applies to the doctors as well, you should consider the demeanor of the witness, how he impressed you, his interest if any in the case or in the parties, whether he was frank or forthright, or evasive, whether there was a motive to falsify, the witness' opportunity for observations as to the matters which were the subject of his testimony.

In short, in deciding whether a witness' testimony is credible or believable what you do is to size him up to determine whether he is reliable and trustworthy.

15 Again you use your common sense here as well as in all other aspects of your deliberations. If you find that any witness willfully testified falsely to any material fact you may disregard the testimony of that witness in its entirety, or you may accept such part or portion which commends itself to your belief or which you may find is corroborated by other evidence in the case.

You should not be concerned, I am sure you will not be, with who the parties are. The fact that the defendant is here in the person of two corporations must not enter into your deliberations in any way because you are ministers of justice and justice cannot prevail if sympathy or prejudice enters into your deliberations.

Your oath is to render justice fairly and impartially without fear or favor and to decide the fact issues solely upon the evidence in the case.

Each juror is entitled to his or her opinion, but you are required to exchange views with your fellow jurors. This is the very purpose of deliberation. It is your duty to discuss the evidence. If you have a point of view and if after reasoning with other jurors it appears your judgment is open to question, then of course you should have no hesitancy whatsoever in yielding your point of view.

But that is only if you are convinced that the opposite point of view is really one that satisfies your own conscience and judgment. You are not to give up a point of view that you conscientiously believe in simply because you are outnumbered or outweighed.

I finally charge you that to return a verdict it must be a unanimous verdict of all six jurors and must be either for the defendant or for the plaintiff in some amount.

Now, I do want to say that I read parts of this to you out of context. I want to again urge upon you that in giving consideration to the issues here you keep my entire charge in mind. This is merely to refresh your recollection on those portions and not to be taken in an isolated fashion.

You are to apply the entire charge as I gave it to you at the outset.

All right, you may retire and continue deliberations.

MR. CORCORAN: May I say something, your Honor?

THE COURT: You may, when the jury has retired.

(Jurors leave the courtroom to continue deliberations.)

THE COURT: Yes, sir.

MR. CORCORAN: Your Honor called this session in response to a communication addressed to the court by the jury, and as I understand the communication to be it is what is the definition of seaworthiness, what is the definition of unseaworthiness.

It is my understanding and recollection that your Honor gave the definition of seaworthiness, but did not give the definition of unseaworthiness in response to the request of the jury for these definitions.

I do not believe that you used the word unseaworthy at any time during this explanation.

THE COURT: Well, Mr. Corcoran, I trust I answered the jury's question as best I could. I told them that the entire charge was before them and they seemed to be satisfied with the portions that were read to them. They were abjured to consider the entire charge, and if I did not meet your test I trust I have given them what they asked for which, after all, is the controlling question.

MR. CORCORAN: Well, under the circumstances, your Honor, the failure to answer the jury's question as to the definition of unseaworthiness, now that it's been brought to your attention, I believe requires that such a definition be given.

THE COURT: Well, I decline to do that.

MR. CORCORAN: May I have an exception to that?

THE COURT: Yes.

XXX (Court's Exhibit 3 marked for identification.)

(Recess.)

(Open court - jury not present.)

THE COURT: The note, which is to be marked Court's Exhibit 4, reads: "We have reached a verdict."

XXX (Court's Exhibit 4 marked for identification.)

(Jurors enter the courtroom.)

THE CLERK: Members of the jury, please answer present as your names are called.

(Roll of the jury taken, all present.)

THE CLERK: Madam Forelady, please rise. Has the jury reached a verdict?

THE FORELADY: Yes.

THE CLERK: How do you find?

THE FORELADY: In favor of the defendant.

THE CLERK: Thank you. Be seated, please.

Listen to your verdict as it stands recorded. You say you find for the defendant, and so say you all.

Mrs. Tort; is that your verdict?

MRS. TORT: Yes.

THE CLERK: Mr. Buckout;is that your verdict?

MR. BUCKOUT: Yes.

THE CLERK: Mr. Malori; is that your verdict?

MR. MALORI: Yes.

THE CLERK: Mrs. Neufer; is that your verdict?

MRS. NEUFER: Yes.

THE CLERK: Mr. Massa; is that your verdict?

MR. MASSA: Yes.

THE CLERK: Mr. Schwab; is that your verdict?

MR. SCHWAB: Yes.

THE CLERK: The verdict is unanimous.

THE COURT: Ladies and gentlemen, may I thank you for your service and say that you have in my judgment been true ministers of justice. This is Tuesday, and you are discharged for the week, you are discharged for the balance of the term with my thanks for your very careful service.

MR. CORCORAN: Your Honor, I move to set aside the verdict on the ground it is against the evidence, the weight of the evidence and all the rules set forth in the rules of civil procedure, and on all the evidence in this case and on all the evidence that was excluded in this case.

THE COURT: That motion is denied.

Is there anything further?

MR. BROWNE: Thank you very much, your Honor.

(Court adjourned.)

JUDGMENT APPEALED FROM.

U.S. DISTRICT COURT
FILED
MAR 26 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MICHAEL McSWEENEY : 72 Civil 1782 (RO)

Plaintiff

-against- :

JUDGMENT

M. J. RUDOLPH CO., INC. :
M. J. RUDOLPH CORP.
YAMASHITA SHINNIHON LINE and :
INTERNATIONAL TERMINAL OPERATING
CO., INC. :

Defendants

- X

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Richard Owen, United States District Judge, and a jury, on March 18,19,22 and 23, 1976, and the Court having granted motions to dismiss as to defendants Yamashita and International Terminal, and motion as to negligence claim as to defendants Rudolph having been granted, and the jury having returned a verdict in favor of defendants Rudolph, it is,

ORDERED, ADJUDGED and DECREED: That defendants M.J. RUDOLPH CO., INC., and M.J. RUDOLPH CORP., have judgment against plaintiff MICHAEL McSWEENEY dismissing the complaint, and it is further,

ORDERED: That the complaint be and it is hereby dismissed as to the remaining defendants.

Dated: New York, N.Y.
March 26, 1976

Raymond F. Burghardt
Clerk

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------X

MICHAEL McSWEENEY,

Plaintiff,

-against-

M. J. RUDOLPH CO., INC.,
M. J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE and
INTERNATIONAL TERMINAL OPERATING
CO., INC.

Defendants
-----------------------------------X

72 Civ. 1782 (RO)

NOTICE OF APPEAL

FILED
U.S. DISTRICT COURT
APR 2, 1976
S.D. OF N.Y.

Notice is hereby given that MICHAEL McSWEENEY, the Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment dated and entered on March 26, 1976, dismissing the complaint against the Defendant YAMASHITA SHINNIHON LINE and INTERNATIONAL TERMINAL OPERATING CO., INC. and from the order granting the dismissal as to the negligence claim as against the Defendants, M. J. RUDOLPH CO., INC. and M. J. RUDOLPH CORP. and the jury having returned a verdict in favor of the Defendants M. J. RUDOLPH CO., INC. and M. J. RUDOLPH CORP. and against the Plaintiff, MICHAEL McSWEENEY, on the claim of unseaworthiness and judgment having been entered in favor of the Defendants M. J. RUDOLPH CO., INC., and M. J. RUDOLPH CORP. and against

the Plaintiff on said issue of unseaworthiness and the Plaintiff, MICHAEL McSWEENEY, appeals from the judgment and order dismissing the complaint as to the remaining Defendants and the Plaintiff appeals from said judgment and each and every part thereof.

Dated: New York, New York
March 31, 1976

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, N. Y. 10007
Tel: (212) 227-2242

BY ______________________
WILLIAM J. CORCORAN
A Member of the Firm

NOTICE OF APPEAL

TO:

CLERK, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FOLEY SQUARE
NEW YORK, N. Y.

D'AMATO, COSTELLO & SHEA, ESQS.
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OPERATING CO., INC.
10 Rockefeller Plaza
New York, New York 10020

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

The Unoted States Court of Appeals for the Second circuit

Michael Mc Sweeney
vs

M.J. Rudolph et al

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Bernard S. Greenberg being duly sworn,
deposes and says that he is over the age of 21 years and resides at 162 E. 7th st, NY, NY

That on the 6th day of July, 1976, ~~1975~~
he served the annexed appendix and brief of the plaintiff-appellant upon

1. D'Amato, Costello & Shea, attorneys for the defendant-appellees M.J. Rudolph Co, Inc., and M.J Rudolph, 116 John street, NY, NY
2. Semel, McLaughlin & Boeckmann, attorneys for the defendant-appelle International Terminal Operating co, inc., 10 Rockefeller plaza, NY, NY
3. Kirlin, Campbell & Keating, attorneys for the Defendant-appellees Yamashita Shinnihon Line, 120 Broadway, NY, NY

in this action, by delivering to and leaving with said attorneys

two copies of the appendix and three of the brief ~~three~~ true copies to each thereof.

Deponent Further Says, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this ....

day of ...., 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977